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Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine

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Articles

PRIVATE RIGHTS IN PUBLIC LANDS: THE CHICAGO LAKEFRONT, MONTGOMERY WARD, AND THE PUBLIC DEDICATION DOCTRINE

Joseph D. Kearney & Thomas W. Merrill***

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INTRODUCTION

When one thinks of how the law protects public rights in open spaces, the public trust doctrine comes to mind. This is especially true in Chicago. The modern public trust doctrine was born in the landmark decision in *Illinois Central Railroad Co. v. Illinois*,¹ growing out of struggles over the use of land along the margin of Lake Michigan in that city.² Yet Chicago's premier park—Grant Park, sitting on that land in the center of downtown Chicago—owes its existence to a different legal doctrine. This other doctrine, developed by American courts in the nineteenth century, holds that owners of private property abutting land dedicated to a public use have a right to enjoin deviations from the dedication. This “public dedication” doctrine was invoked by Aaron Montgomery Ward, the famous Chicago catalog merchant, in a series of actions from 1890 to 1910 to block construction of a variety of structures in Grant Park.³ The body of precedent that Ward created served for more than a century to keep Grant Park free of significant encroachments, saving it as open space for the use and enjoyment of future generations.

The *Ward* cases are an important chapter in the history of the Chicago lakefront. In 1887, Ward and his partner, George A. Thorne, purchased property on the west side of Michigan Avenue facing Lake Michigan from which to operate their burgeoning mail-order business. The pair paid a premium for the land because it allowed them to construct a building favored with sunlight, fresh breezes, and lake views over the public land to the east. Ward became upset, or so the story goes, when he observed workers building scaffolding in the park to load garbage into railroad cars for transport out of the City.⁴ Ward sued, claiming that this activity violated language on a map of the original subdivision where his property was

¹ 146 U.S. 387 (1892).

² See Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

³ *City of Chicago v. Ward*, 169 Ill. 392, 48 N.E. 927 (1897); *Bliss v. Ward*, 198 Ill. 104, 64 N.E. 705 (1902); *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N.E. 731 (1909); *S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1910).

⁴ See generally Transcript of Record at 8–9, 41, *Ward*, 169 Ill. 392, 48 N.E. 927 (No. 129568); LOIS WILLE, *FOREVER OPEN, CLEAR AND FREE: THE STRUGGLE FOR CHICAGO'S LAKEFRONT* 71–74 (Univ. of Chi. Press 1991) (1972) (describing Ward's reaction to goings-on in the park). The transcripts of the record in the *Ward* cases are available at the Illinois State Archives in Springfield in the Supreme Court of Illinois Case Files 1820–1970.

located which stipulated that the space east of Michigan Avenue would be “[p]ublic ground forever to remain vacant of buildings.”⁵ Ward was able to show that this language created a public dedication of the land and that he, as an abutting property owner, had standing to secure an injunction against violations of the dedication. The Illinois Supreme Court ruled in Ward’s favor in four major decisions, enjoining the construction not just of loading platforms but also of a National Guard armory and a natural history museum.⁶

In the wake of Ward’s victories, the public dedication doctrine was wielded by generations of Michigan Avenue landowners to fend off construction of public buildings in what became a 319-acre park. Only at the dawn of the twenty-first century were the *Ward* precedents overcome. Led by a mayor determined to bring more activity to downtown Chicago and promote tourism, the City, in conjunction with a consortium of wealthy private donors, constructed a \$370 million project known as Millennium Park in the northwest corner of Grant Park, directly opposite the site of Montgomery Ward’s original catalog warehouse.⁷ Millennium Park features, among other things, a 130-foot-tall stainless-steel music pavilion designed by Frank Gehry, a multipurpose theater, a restaurant, and a pair of fifty-foot towers emitting water from faces on giant LED screens.⁸ The City obtained consents to the construction of Millennium Park from owners of property abutting the northwest corner of Grant Park, and these consents were held by a state court judge, in an unpublished order, to be an effective waiver of the public dedication.⁹ It remains to be seen whether this bypass of the dedication will undermine the *Ward* precedents or even cause them to collapse altogether.

The public dedication doctrine is significant for reasons that go beyond understanding the historical development of the Chicago lakefront. It also provides a significant point of juxtaposition to the public trust doctrine, which by a remarkable coincidence emerged at roughly the same time and place as the *Ward* precedents.¹⁰ Both the public trust doctrine and the public dedication doctrine are designed to preserve spaces dedicated to public uses.¹¹ The public trust doctrine seeks to preserve public spaces by

⁵ *Ward*, 169 Ill. at 402, 48 N.E. at 930 (internal quotation marks omitted).

⁶ *Id.* at 422, 48 N.E. at 937; *Bliss*, 198 Ill. at 121, 64 N.E. at 709; *Field Museum*, 241 Ill. at 510, 89 N.E. at 737; *S. Park Comm’rs*, 248 Ill. at 313, 93 N.E. at 915.

⁷ TIMOTHY J. GILFOYLE, *MILLENNIUM PARK: CREATING A CHICAGO LANDMARK* 159 (2006).

⁸ *Id.* at 181, 223, 251, 277, 324.

⁹ *Boaz v. City of Chicago*, No. 99L-3804 (Cook County, Ill., Cir. Ct. Jan. 14, 2000).

¹⁰ The public trust doctrine emerged in modern form with the *Illinois Central* decision in 1892. See *Kearney & Merrill*, *supra* note 2, at 800. The first *Ward* case was filed in 1890 and decided in 1897. *Ward*, 169 Ill. at 393, 48 N.E. at 927.

¹¹ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 724–25, 727–30 (1986) (discussing the foundation of the public dedication and public trust doctrines).

positing that certain resources are held in a restricted title that disables any transfer of these resources into the hands of private owners.¹² The public dedication doctrine pursues the same end by recognizing the right of a select group of landowners uniquely affected by public spaces to sue in equity to prevent departures from the dedicated use.

Yet even if they serve similar functions, the two doctrines differ in several important respects. The public trust doctrine is effectively confined to land having some nexus with navigable waters; the public dedication doctrine covers a much wider range of streets, parks, and public squares. The public trust doctrine rests on the imputation of an imprecisely defined trust obligation; the public dedication doctrine, which often relies on publicly recorded maps and plats, applies to a more easily ascertained set of resources and incorporates a clearer conception of what is prohibited.¹³

Perhaps most significantly, the public dedication doctrine and the public trust doctrine are governed by very different standing rules. Under the public trust doctrine, there are two logical standing rules: either the state alone, through its legal officers, can sue to enforce the public trust, or any citizen of the state can sue to enforce the trust.¹⁴ The former rule precludes all private enforcement and leaves enforcement up to the vagaries of the political process; the latter rule allows any person, no matter how remote his or her connection to the resource, to invoke the doctrine, and effectively confers enforcement authority on nonprofit advocacy groups. Under the public dedication doctrine, by contrast, an intermediate standing rule applies: in addition to the public authority that holds title to the burdened land, the doctrine also confers standing on abutting landowners, typically a moderate-sized group of individuals who have a strong interest in maintaining the public nature of the resource.¹⁵ This group of potential plaintiffs is large enough to ensure a variety of perspectives on whether the dedication should be enforced, but small enough that public authorities can attempt to secure their consent in advance of undertaking a project that arguably violates the dedication. This intermediate standing rule arguably strikes a better balance than either of the rules associated with the public trust doctrine.

The public dedication doctrine, particularly as it was applied in the *Ward* cases, is also significant because it allows us to evaluate the recent

¹² Thomas W. Merrill, *Private Property and Public Rights*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 75, 76–86 (Kenneth Ayotte & Henry E. Smith eds., 2011).

¹³ See *infra* Part VI.B.

¹⁴ Illinois traditionally followed the rule that only officers of the State could enforce the trust. See, e.g., *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 152–53, 45 N.E. 830, 835 (1896). More recently, the Illinois Supreme Court overruled this understanding and held that any taxpayer can sue to enforce the trust. *Paepcke v. Pub. Bldg. Comm'n*, 46 Ill. 2d 330, 341–42, 263 N.E.2d 11, 18 (1970); see, e.g., *Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 786 N.E.2d 161 (2003).

¹⁵ See *infra* Part VI.B.

proposal to create “antiproperty” rights as a way of protecting resources such as public parks. Abraham Bell and Gideon Parchomovsky have argued that parks and other open spaces are vulnerable to capture of local governments by interest groups seeking development opportunities.¹⁶ They have proposed as a solution that private-property owners who benefit disproportionately from parks and similar resources should be given veto power over any proposal to develop these resources.¹⁷ If the holders of such antiproperty rights are sufficiently numerous, they argue, the high transaction costs of achieving unanimous consent to development will effectively freeze public spaces in their current, open-space state.¹⁸ Their proposal, in effect, exactly replicates the traditional public dedication doctrine.

Although it is always difficult to generalize from a small number of events, one real-world example that has played out over a significant period of time is much more illuminating than a purely hypothetical argument. The history of the public dedication doctrine on the Chicago lakefront suggests that antiproperty rights can serve as a powerful form of protection for public property. The public dedication doctrine secured most of Grant Park’s 319 acres as open space while allowing, through the consent mechanism, for the construction of selective improvements such as the Chicago Art Institute and the miscellaneous structures of Millennium Park, both of which enjoy broad public support.

There is also evidence, however, that the public dedication doctrine has resulted in overprotection of the park as open space. It is far from clear that Montgomery Ward’s adamant refusal to allow the Field Museum of Natural History to be constructed in Grant Park was consistent with what most persons in Chicago wanted. Ward’s stubbornness yielded an open space that now features one cluster of public buildings along Grant Park’s west and north edges (the Art Institute and Millennium Park) and another cluster (now called the “Museum Campus”) outside the south and southeast edges; the distance between the two clusters makes it difficult to walk between them in a single outing. Perhaps even more strikingly, for three decades the *Ward* precedents frustrated every plan for the erection of a new pavilion for summer concerts in Grant Park.¹⁹ Presumably, abutting landowners preferred that the park remain quiet and empty on summer evenings, but this preference is almost certainly contrary to how the general public would want the space to be used. Thus, the history suggests that the incentives of abutting property owners will not always align with those of the larger public.

¹⁶ Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1 (2003).

¹⁷ *Id.* at 5–6.

¹⁸ *Id.* at 38–48.

¹⁹ See GILFOYLE, *supra* note 7, at 43–77.

This Article is organized as follows: Part I describes the evolution of the space that is now known as Grant Park. Part II traces the origins of the public dedication doctrine in the nineteenth century. Part III describes how that doctrine was invoked in controversies over the use of the Chicago lakefront before Montgomery Ward came on the scene. Part IV details Ward's remarkable crusade to save Grant Park as an unencumbered open space, which created a powerful body of precedent having a lasting impact on the use of the park. Part V describes the limits of the public dedication doctrine that was recognized in the *Ward* precedents. Part VI offers some brief observations about why the public trust doctrine eclipsed the public dedication doctrine, compares the efficacy of the two doctrines in the context of the Chicago lakefront, and offers some general reflections about what this history tells us about the promises and pitfalls of recognizing antiproperty rights to contest development of public spaces.

I. CONSTRUCTING A LAKEFRONT PARK

In order to understand the controversies that gave rise to the *Ward* cases and their significance for the physical configuration of the Chicago lakefront, it is necessary to know something about the history of the space that is now called Grant Park. In contrast to other famous urban parks, such as Central Park in New York City, Grant Park is almost entirely manmade and was constructed in fits and starts over more than a century and a half. In this Part, we highlight the major events in the evolution of the park, with particular attention to issues arising under the public dedication doctrine.

A. *The Early Chicago Lakefront*

The space that is now Grant Park, like the rest of Illinois, was part of the Northwest Territories ceded by Virginia and other states to the general government around the time of the Revolutionary War.²⁰ When Illinois became a state in 1818, the only significant human presence in the place that would become Chicago was a military outpost called Fort Dearborn, located on the south bank of the Chicago River where the river emptied into Lake Michigan.²¹ By 1833, when it was incorporated as a town, Chicago had grown to a population of some 200–300.²² It soon began to expand at a geometric rate, spurred by a plan to build a canal that would join the Chicago River, which was connected via the Great Lakes and the Erie Canal to the East Coast, with the Des Plaines River, which flows into the Illinois River and thence to the Mississippi River and was thus connected to

²⁰ See PAUL W. GATES, PUB. LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49–55 (photo. reprint 1979) (1968).

²¹ ROBERT P. HOWARD, ILLINOIS: A HISTORY OF THE PRAIRIE STATE 94–95 (1972).

²² Estimates vary as to how many individuals lived in Chicago at that time. The total population certainly exceeded the 150 individuals required for incorporation as a town. PAUL GILBERT & CHARLES LEE BRYSON, CHICAGO AND ITS MAKERS 57 (1929).

the port of New Orleans.²³ Congress granted significant federal land to Illinois to subsidize the construction of such a canal, and in 1829 a Board of Canal Commissioners was established under state law to sell this land, with the proceeds to underwrite construction of the canal.²⁴

All land in Illinois was surveyed in accordance with the rectilinear grid established by the Land Ordinance of 1785, whereby land was divided into square townships of thirty-six numbered sections each of which contained 3600 acres.²⁵ Congress granted to Illinois the odd-numbered sections for two-and-a-half miles on each side of the proposed route of the canal, and the State in turn granted these sections to the Canal Commissioners.²⁶ One of these sections was fractional section 15 of township 39, located in what now includes the southeast portion of Chicago's loop. It was bounded on the west by State Street, on the north by Madison Street, on the south by 12th Street, and on the east by Lake Michigan. It was called "fractional" because most of section 15 was under Lake Michigan, and everyone assumed that the Canal Commissioners would not sell submerged land under the lake. A map of fractional section 15 is reproduced as Figure 1.²⁷

²³ *Id.* at 82–84; see also Perry R. Duis, *The Shaping of Chicago*, in AIA GUIDE TO CHICAGO 2 (Alice Sinkevitch ed., 2d ed. 2004) ("By 1836, when work on the canal began in earnest, optimism about Chicago's future had boosted land prices to astronomical levels and attracted over 3,000 more residents.").

²⁴ Act of Mar. 30, 1822, ch. 14, 3 Stat. 659; Act of Mar. 2, 1827, ch. 51, 4 Stat. 234; 1829 Ill. Laws 14. That board was abolished in 1833 and reestablished in 1836. 1833 Ill. Laws 113; 1836 Ill. Laws 145; HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 11–12 (Beard Books 2000) (1933).

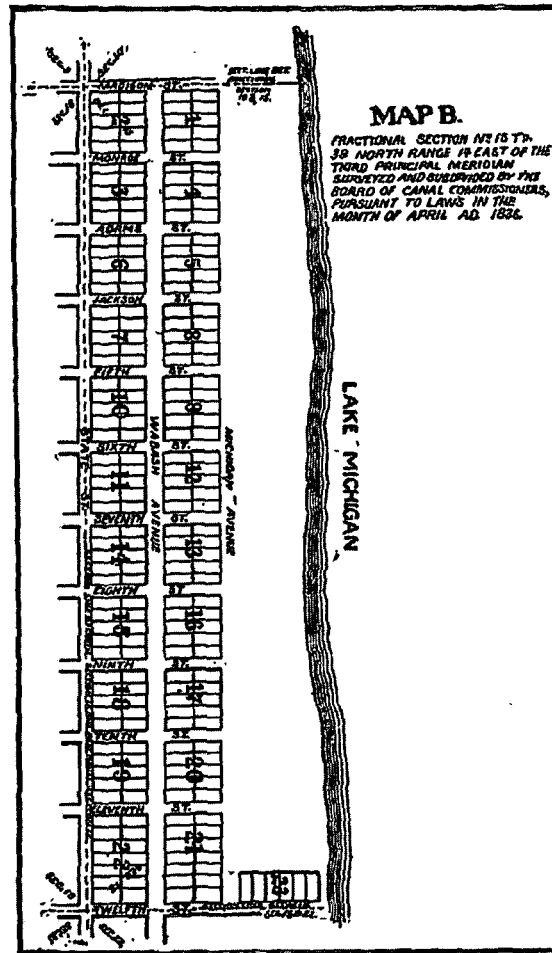
²⁵ GATES, *supra* note 20, at 68.

²⁶ *Id.* at 350; Dennis H. Cremin, *Building Chicago's Front Yard: Grant Park 1836 to 1936*, at 28 (Jan. 1999) (unpublished Ph.D. dissertation, Loyola University Chicago) (UMI No. 9917766).

²⁷ Figure 1 is taken from the *Illinois Central* litigation in the United States Reports. See Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 397 (1892) ("Map B" in the statement of the case). See generally Kearney & Merrill, *supra* note 2 (recounting this litigation). Its origins are worth detailing. The original map on which Figure 1 is based can be found in the Illinois State Archives, record number 491.105 Plats. Justice John Marshall Harlan's circuit court opinion in the *Illinois Central* litigation contains a stylized version of this original map (which was then housed in the Canal Commissioners' office in Lockport, Illinois). *Illinois v. Ill. Cent. R.R.*, 33 F. 730, 739 (C.C.N.D. Ill. 1888), *aff'd*, Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892). That version (denominated "Map B" in the circuit court opinion) contains most of the information from the original map, whereas "Map B" as it appears in the U.S. Reports (i.e., Figure 1 here) is simplified. Compare *id.* at 739, with 146 U.S. at 397. The Supreme Court Reporter, published by West Publishing Co., contains a map closer to the version in Justice Harlan's opinion in the Federal Reporter than to the one in the official U.S. Reports. See Ill. Cent. R.R. v. Illinois, 36 S. Ct. 1018, 1022–23 (1892) (foldout map).

A version of the original map can also be found in the Cook County recorder's office. The map was filed for recording in Cook County on June 18, 1836, with a copy made and deemed recorded on July 20, 1836, but this copy was destroyed in the Chicago Fire of 1871. After the fire, the map was rerecorded on September 24, 1877, and the resulting copy is now found in Plats book 12, page 82, in the Office of the Cook County Recorder of Deeds.

FIGURE 1: FRACTIONAL SECTION 15

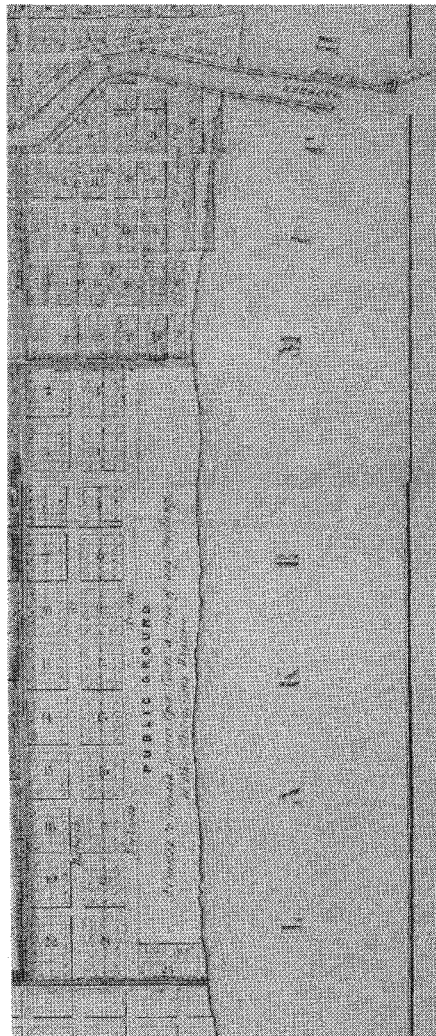


Notice that the easternmost portion of the solid land—from Madison south to 12th Street, save only a small block between 11th and 12th—was not platted. The Canal Commissioners' map designates the entire area between the platted blocks and Lake Michigan as "Michigan Avenue." A commercial map from the same period labeled this area "PUBLIC GROUND[—]A Common to remain forever Open, Clear & free of any buildings, or other Obstructions Whatever" (see Figure 2).²⁸ According to

²⁸ The map in Figure 2 was published by the lithography firm of Peter A. Meisner in New York. ROBERT A. HOLLAND, *CHICAGO IN MAPS: 1612 TO 2002*, at 61, 64 (2005). Its primary purpose was probably to promote land sales to buyers on the East Coast. See Elaine Lewinnek, *Mapping Chicago, Imagining Metropolises: Reconsidering the Zonal Model of Urban Growth*, 36 J. URB. HIST. 197, 199 (2010). Note that areas not yet officially platted, such as section 10 (the area immediately north of section 15), are filled in with imagined future subdivided land (indeed, all the way east to the lake).

testimony submitted in the *Ward* cases, the Canal Commissioners represented to prospective purchasers that the land east of Michigan Avenue would remain an open public space, and it is likely that this commercial map (or a similar visual aid) was used by the Canal Commissioners in marketing the land.²⁹

FIGURE 2: COMMERCIAL MAP OF FRACTIONAL SECTION 15. "CHICAGO WITH SEVERAL ADDITIONS COMPILED FROM RECORDED PLATS IN THE CLERK'S OFFICE (1836)"³⁰



²⁹ Transcript of Record, *supra* note 4, at 277–78 (testimony of Fernando Jones).

³⁰ On file with Chicago History Museum ICHi-37310.

Based on representations that the land east of Michigan Avenue would remain open space, the platted lots fronting on the west side of Michigan Avenue sold for higher prices than other land in fractional section 15.³¹

Soon afterward, the U.S. Army decided to abandon Fort Dearborn, which was located in fractional section 10, immediately north of fractional section 15.³² This area was accordingly opened for sale by the federal government as the "Fort Dearborn Addition to Chicago."³³ A version of an 1839 map of the Fort Dearborn subdivision, which was publicly recorded, is reproduced as Figure 3.³⁴ Notice that the map includes a notation in the area south of Randolph Street and north of Washington Street, encompassing what would be Michigan Avenue and half of block 12 and saying "public ground for ever to remain vacant of buildings." Moreover, a note in the margin of the original map signed by Matthew Birchard, the federal agent who negotiated the sales and recorded the map with Cook County officials in 1839, states as follows: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description."³⁵ Again, testimony was

³¹ Transcript of Record, *supra* note 4, at 244 ("Lots fronting east on Michigan avenue did sell for more than on Wabash, and efforts were made by the canal commissioners . . . to obtain a higher price on account of the eastern exposure on the lake.") (testimony of Fernando Jones). Section 15 was publicized by city promoters as having large lots and a "promenade . . . between [the lots] and the Lake, [making it] a very desirable place for private residences." CHI. AM., Apr. 23, 1836, at 1. Chicago experienced much land speculation between 1830 and 1842, which affected land prices significantly. HOYT, *supra* note 24, at 3–44.

³² Ill. Cent. R.R., 33 F. at 733, 753.

³³ *Id.* at 734 (internal quotation marks omitted).

³⁴ Figure 3 is a reproduction of Map A in the *Illinois Central* litigation, as it appears in the United States Reports. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 392 (1892) (statement of the case). The Supreme Court Reporter and circuit court opinion contain more detailed versions of the same map. See Ill. Cent. R.R. v. Illinois, 36 S. Ct. 1018, 1020–21 (1892) (foldout map); Ill. Cent. R.R., 33 F. at 735.

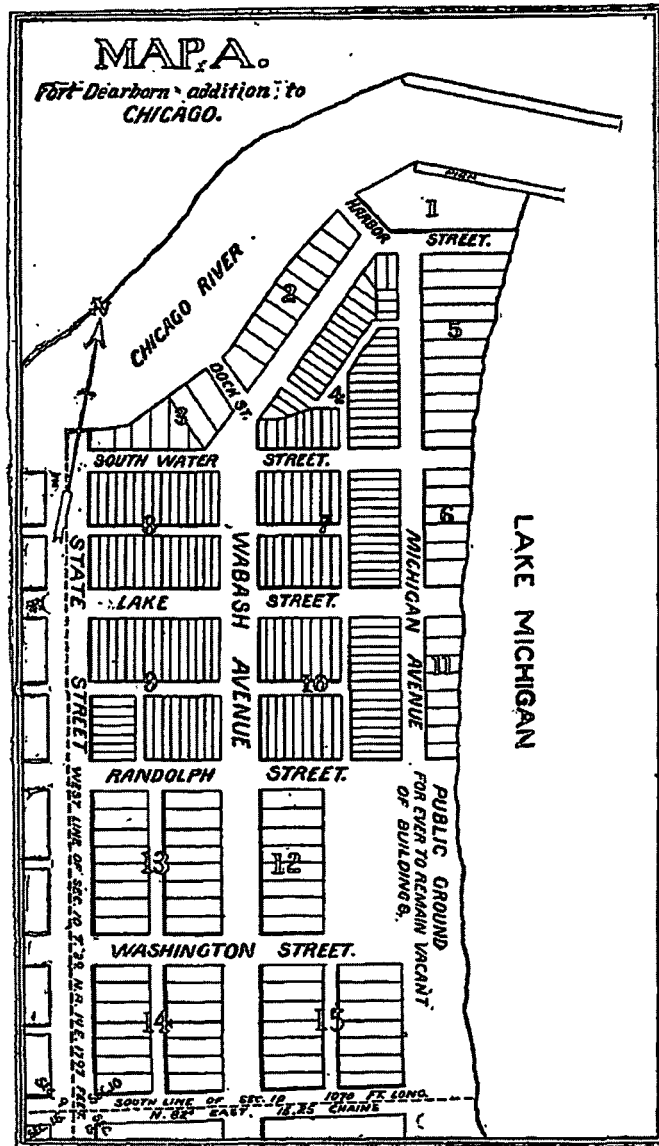
³⁵ Ill. Cent. R.R., 33 F. at 734 n.1. The original recorded copy of this map burned in the Chicago Fire of 1871, and the map was not rerecorded after the fire. The only record on file with the Office of the Cook County Recorder of Deeds today is an unofficial copy of a map found on page 2B of both tract books 460A and 460B. It is unknown whether the original document containing Birchard's comment still exists.

Several contemporaneous maps of the area contain language of dedication similar to that of Figure 3, including maps found in the records of the U.S. Senate. See, e.g., U.S. Senate, *Maps Accompanying the Report of Thomas Jefferson Cram in Senate Document 140, in 4 PUBLIC DOCUMENTS PRINTED BY ORDER OF THE SENATE OF THE UNITED STATES DURING THE FIRST SESSION OF THE TWENTY-SIXTH CONGRESS (1839); Fort Dearborn Addition to Chicago, 1839*, ENCYCLOPEDIA CHI., <http://www.encyclopedia.chicagohistory.org/pages/10710.html> (last visited Aug. 14, 2011).

There is evidence that the restriction of land as "public ground" was demanded by local residents. Anticipating the sale of the abandoned Fort Dearborn, local residents of Chicago adopted a resolution supporting an application for a grant of the land, "upon the express condition" that twenty acres fronting Lake Michigan be reserved for a public square free from buildings, with that area to revert to the federal government in the event it were built upon. See CHI. DEMOCRAT, Nov. 4, 1835. The map restriction as written contains no language of reversion. The Supreme Court later held, in *United States v. Illinois*

offered much later in the *Ward* litigation that lots abutting this area were sold at a premium based on the understanding that they would enjoy direct exposure to Lake Michigan.³⁶

FIGURE 3: FRACTIONAL SECTION 10



Central Railroad, 154 U.S. 225, 241–42 (1894), that the federal government retained no property rights in section 10.

³⁶ See Transcript of Record, *supra* note 4, at 244.

These map and plat notations would provide the legal foundation for the later invocation of the public dedication doctrine by owners of land on the west side of Michigan Avenue. Otherwise, there were no legal restrictions on how land along the lakefront might be used. There was no zoning ordinance in Chicago in the nineteenth century; public regulation of land use would come only much later.³⁷

The preferred use of Michigan Avenue property, at least initially, was for residential structures. The western side of Michigan Avenue quickly filled with large residential structures populated by the Chicago elite.³⁸ The land to the east of Michigan Avenue, in keeping with the restrictions appearing on various maps as recounted above, remained vacant of permanent structures.³⁹ This area, stretching from Randolph Street on the north to Park Row on the south, came to be known as "Lake Park," and was officially given this designation by city ordinances enacted in the 1840s.⁴⁰ There was at this time, however, no formal governmental structure for preserving and maintaining the park.

The most pressing problem Michigan Avenue residents faced in the 1840s and 1850s was not to prevent construction in Lake Park, but to ensure that the park did not disappear altogether.⁴¹ Severe erosion became a significant problem along this portion of the lakefront, especially after winter storms.⁴² At one point, Michigan Avenue residents had to work through the night for fear that the water would wash away not only the street but also the residences on its west side.⁴³ Everyone recognized that

³⁷ Chicago first adopted a zoning ordinance in 1923. JOSEPH P. SCHWIETERMAN & DANA M. CASPALL, *THE POLITICS OF PLACE: A HISTORY OF ZONING IN CHICAGO* 17–25 (2006).

³⁸ See HERMAN KOGAN & ROBERT CROMIE, *THE GREAT FIRE: CHICAGO 1871*, at 19–20, 23 (1971).

³⁹ See Transcript of Record, *supra* note 4, at 203–04 (testimony of Jonathan Young Scammon). Scammon, who had lived in Chicago since 1835 and was regarded as an expert on the history of the lakefront, had died by the time the first *Ward* case went to trial. He had previously testified about lakefront history in an injunction proceeding in 1869, see *infra* notes 199–209 and accompanying text, and the parties in the *Ward* cases stipulated to the introduction of this testimony into evidence. Transcript of Record, *supra* note 4, at 187–88.

⁴⁰ The land was officially designated "Lake Park" in 1847. Chi., Ill., An Ordinance More Definitely Designating Certain Localities in the City of Chicago, and Providing for the Naming and Numbering of Certain Avenues, Streets, Parks, Squares, and Places § 4 (Aug. 10, 1847), in CHARTER OF THE CITY OF CHICAGO AND AMENDMENTS WITH RULES OF COUNCIL AND ORDINANCES 76 (Chicago, Democrat Office 1849). The City had also passed a resolution in 1844 to enclose much of the area east of Michigan Avenue as a park. However, resolutions from that era were not officially published and the original copy has been lost. The resolution was read into the record in the first *Ward* case. Transcript of Record, *supra* note 4, at 103–04.

⁴¹ See Transcript of Record, *supra* note 4, at 203–04 (testimony of Jonathan Young Scammon).

⁴² See *id.*

⁴³ *Id.*

some kind of breakwater was needed to protect the shore, but no agreement could be reached on a mechanism for financing such a project.⁴⁴

B. Entry of the Illinois Central Railroad

At this point, the newly chartered Illinois Central Railroad came onto the scene. The railroad wanted access to the Chicago River, where grain and other commodities were transferred to vessels for reshipment to the East Coast.⁴⁵ The railroad proposed that it be allowed to enter the City along the lakefront and construct a terminal between Randolph Street and the Chicago River. The City agreed, provided that the railroad would locate its tracks outside Lake Park, on trestles in the lake, and would construct a substantial breakwater to protect the shore.⁴⁶ In deference to the interests of the Michigan Avenue residents, the authorizing ordinance prohibited the railroad from allowing trains to remain standing in this area and from constructing any building or other improvements in Lake Park that might obstruct the views from the shore.⁴⁷ All the railroad's terminal and switching facilities were to be located either north of Randolph Street or south of 12th Street.⁴⁸

One can see further evidence of the influence of the Michigan Avenue landowners in the revised charter of the City adopted by the state legislature in 1861 and 1863. The charter included a section providing in part that "[n]o encroachment shall be made upon the land or water west of [the Illinois Central Railroad right-of-way] by any railroad company," and permitted any owner of a lot fronting Michigan Avenue to sue to enjoin "any such encroachments."⁴⁹ For good measure, the charter provided that "[n]either the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue."⁵⁰ Thus, critical elements of the public dedication doctrine were effectively codified in positive law in 1861 and 1863.

Once the Illinois Central facilities were complete, Lake Park took on the somewhat awkward form of a series of narrow strips running north and south (as can be seen in Figure 4). Immediately east of Michigan Avenue

⁴⁴ See ROBIN L. EINHORN, *PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833–1872*, at 91–99 (1991).

⁴⁵ See Edmund W. Kitch & Clara Ann Bowler, *The Facts of Munn v. Illinois*, 1978 SUP. CT. REV. 313, 320–21.

⁴⁶ Kearney & Merrill, *supra* note 2, at 811–25.

⁴⁷ Chi., Ill., An Ordinance Concerning the Illinois Central Railroad §§ 8–9 (June 14, 1852), in CHARTER AND ORDINANCES OF THE CITY OF CHICAGO 352 (George W. & John A. Thompson eds., Chicago, D.B. Cooke & Co. 1856).

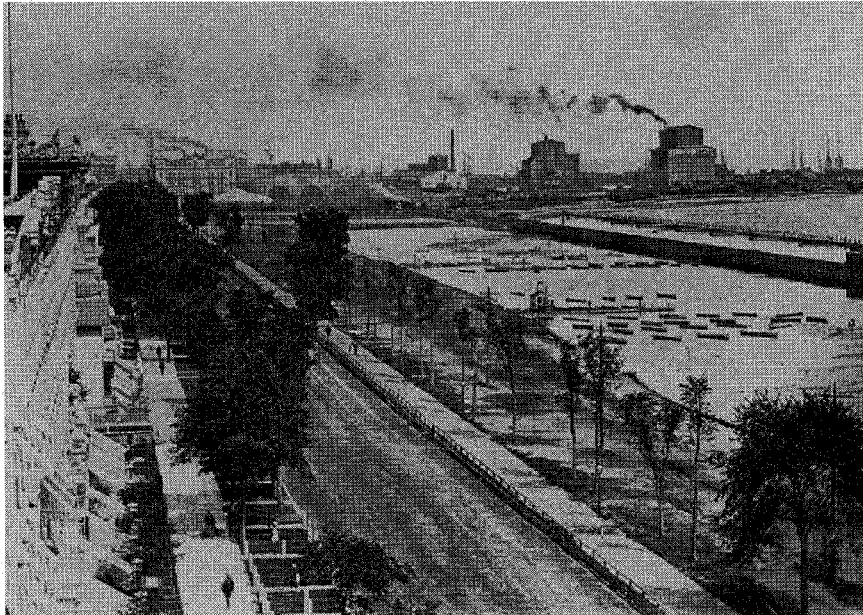
⁴⁸ *Id.* §§ 1, 11.

⁴⁹ 1861 Ill. Laws 118, 136; *accord* 1863 Ill. Laws 40, 96.

⁵⁰ 1861 Ill. Laws 118, 136; *accord* 1863 Ill. Laws 40, 96.

was a narrow strip of solid land. Farther to the east was a strip of shallow water—in effect a lagoon—which served as a harbor for small boats. Even farther to the east was the right-of-way of the Illinois Central, with tracks perched above the water on trestles. Just beyond the tracks (and another thin strip of water) was the protective breakwater. Lake Park retained this basic form from the late 1850s through the 1860s.

FIGURE 4: LAKE PARK “ROWHOUSES ALONG MICHIGAN AVENUE OVERLOOKING RIVER AND FACTORIES, LOOKING NORTH FROM HARRISON STREET CIRCA 1865”⁵¹



In 1869, the Illinois General Assembly enacted a law that sparked intense controversy about the future of the lakefront. The statute was designed to resolve uncertainty about the legal title to Lake Park and transform the Chicago lakefront with a massive new outer harbor.⁵² The area north of Monroe Street and west of the railroad tracks was to be sold by the City to the Illinois Central for \$800,000. The Illinois Central would fill the shallow water in this area and construct an enlarged passenger depot. The area south of Monroe Street and west of the tracks would be conveyed to the City, which would use the \$800,000 to beautify the space as a proper public park. The area east of the tracks, for a distance of one mile from Michigan Avenue, would be conveyed to the Illinois Central for purposes

⁵¹ On file with Chicago History Museum ICHI-62330.

⁵² See Kearney & Merrill, *supra* note 2, at 860–94.

of constructing a new outer harbor to relieve congestion in the existing harbor, the Chicago River.⁵³

The statute was unpopular in Chicago, primarily because \$800,000 was thought to be an inadequate price for north Lake Park, and newspapers quickly dubbed it “the Lake Front Steal.”⁵⁴ The City of Chicago refused officially to accept the first installment of the \$800,000 when it was tendered by the railroad.⁵⁵ The nation had by then entered into an economic depression, and the railroad was in no financial condition to pursue new improvements along the lakefront. The Act, together with the various projects that it envisioned, was effectively dead. In an act that would give rise to litigation resolved only decades later, the Illinois legislature formally repealed it in 1873.⁵⁶

An even more dramatic event occurred on October 8, 1871, when a fire broke out in Mrs. O’Leary’s barn, as the story goes, on the near southwest side of Chicago.⁵⁷ Whipped by high winds, the flames spread rapidly to the north and east, eventually incinerating a large part of the City.⁵⁸ The fine houses on Michigan Avenue were destroyed, as were many of the Illinois Central’s facilities north of Randolph Street.⁵⁹ The railroad’s tracks and most of its rolling stock were spared, an unforeseen benefit of building a railroad in a lake.⁶⁰

The fire had several consequences for Lake Park. Massive amounts of rubble from the City had to be buried. At the suggestion of Mayor Roswell Mason, a former chief engineer of the Illinois Central, much of the debris was dumped in Lake Park, in the area between solid land and the railroad tracks. In fairly short order, all of Lake Park up to the Illinois Central breakwater was filled in, significantly increasing the size of the park.⁶¹ When reconstruction of the City began, the character of Michigan Avenue changed. Rather than residences, miscellaneous commercial structures—eventually made of brick and stone to comply with the new fire code—went up along the west side of Michigan Avenue.⁶² Among the most imposing of the new structures would be the headquarters of Montgomery Ward & Co.

⁵³ *Id.* at 860–77; *see also id.* at 863–64 (describing a requirement in the law that the Illinois Central pay the State seven percent of gross receipts from all leases or improvements of Lake Park).

⁵⁴ *Id.* at 854.

⁵⁵ *Id.* at 895.

⁵⁶ 1873 Ill. Laws 115; Kearney & Merrill, *supra* note 2, at 905–12.

⁵⁷ 3 BESSIE LOUISE PIERCE, A HISTORY OF CHICAGO: THE RISE OF A MODERN CITY 1871–1893, at 3–8 (1957).

⁵⁸ *Id.*

⁵⁹ *See* KOGAN & CROMIE, *supra* note 38, at 92–93.

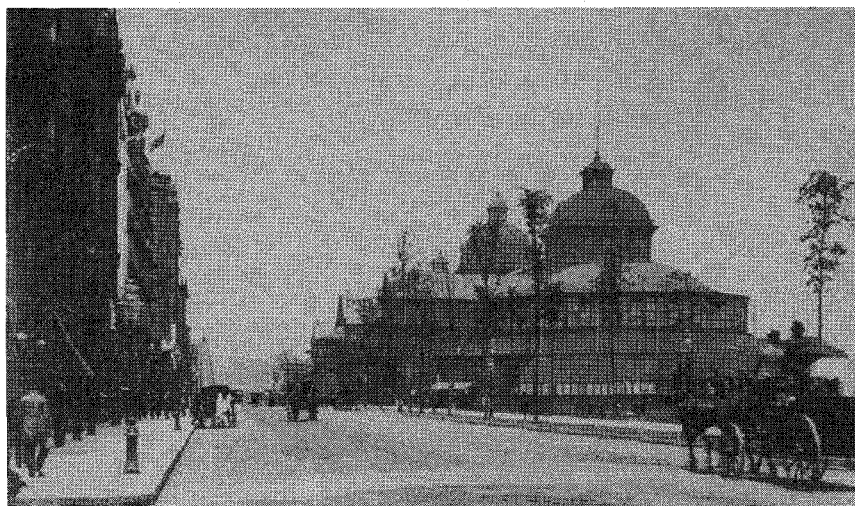
⁶⁰ *See* JOHN F. STOVER, HISTORY OF THE ILLINOIS CENTRAL RAILROAD 182 (1975).

⁶¹ *Id.* at 184.

⁶² *See* HOYT, *supra* note 24, at 102.

The crisis created by the fire also resulted in new uses of Lake Park. In the immediate aftermath of the fire, the City, in a desperate effort to keep the local economy functioning, leased out a portion of Lake Park for temporary commercial buildings.⁶³ Once the rebuilding effort in the downtown was underway, these structures were torn down.⁶⁴ In their place, the City in 1873 authorized the erection of a huge Inter-state Industrial Exposition Building in Lake Park, between Monroe Street and Jackson Street (see Figure 5). The purpose of this structure was to hold an exhibition of Chicago goods and wares in an effort to announce to the world that Chicago had recovered from the devastation.⁶⁵ The exhibition was sufficiently successful that it was extended for a second year, and then other uses were found for the massive building. Eventually, the Inter-state Exposition Building evolved into a kind of all-purpose convention center, hosting agricultural fairs, horticultural displays, art exhibitions, musical concerts, and even the 1884 Republican and Democratic national presidential conventions.⁶⁶ It remained a looming presence on the lakefront until 1892, when it was demolished and replaced by the building that became the Art Institute.⁶⁷

FIGURE 5: INTER-STATE INDUSTRIAL EXPOSITION BUILDING (WITH THREE CUPOLAS);
LOOKING NORTH ON MICHIGAN AVENUE CIRCA 1890⁶⁸



⁶³ *Id.* (discussing temporary buildings on the lakefront).

⁶⁴ See Cremin, *supra* note 26, at 92–97 (discussing the construction of the Inter-state Exposition Building).

⁶⁵ *Id.*

⁶⁶ *Id.* at 100–15; see also R. CRAIG SAUTTER & EDWARD M. BURKE, INSIDE THE WIGWAM: CHICAGO PRESIDENTIAL CONVENTIONS 1860–1996, at 46–65 (1996).

⁶⁷ See *infra* notes 76–81, 312–33 and accompanying text.

⁶⁸ Photograph by J.W. Taylor (on file with Chicago History Museum ICHI-62407).

Michigan Avenue landowners did not object to any of these developments—the landfilling of the shallow water, the temporary commercial structures, or the Inter-state Exposition Building—in the years immediately after the fire. No doubt the shock of the fire and the sense of collective crisis had much to do with this. Moreover, the Michigan Avenue owners could hardly say that these developments were blocking their view, when their houses lay in ruins. The Inter-state Exposition Building was understood to be a temporary structure when it was first erected, and some of the Michigan Avenue elite were either sponsors of this undertaking or were actively involved in the cultural activities that took place in the giant building in later years.⁶⁹ In any event, in part because of the passivity of the Michigan Avenue owners during this period, the City in the ensuing years permitted a variety of structures to be erected in Lake Park. Among these were a stadium for Albert Spalding's Chicago White Stockings Base Ball Club (the forerunner of the Chicago Cubs), initially erected in 1877 and then demolished and replaced by a larger stadium in 1882;⁷⁰ structures to accommodate armory buildings for two companies of state militia, erected in 1881 and demolished in 1897;⁷¹ a passenger depot for the Baltimore & Ohio Railroad, which had obtained trackage rights from the Illinois Central, erected in 1882 and demolished in 1891;⁷² and a massive temporary post office building, erected in 1896, enlarged in 1900, and demolished in 1905.⁷³ Eventually, as we shall see, these structures evoked multiple objections from Michigan Avenue landowners and produced significant litigation.⁷⁴

The 1890s witnessed another event in Chicago history that would have a major impact on the park. Chicago was selected by Congress to be the site of the World's Columbian Exposition, celebrating the 400th anniversary of Christopher Columbus's voyage to the New World. At first, it was expected that this World's Fair would be located in Lake Park. But this would have required extensive landfilling to enlarge the park, and was opposed both by the Illinois Central and by the War Department, which by

⁶⁹ See *Our Exposition*, CHI. TRIB., Mar. 21, 1873, at 3; *The Council*, CHI. TRIB., Apr. 29, 1873, at 3; Cremin, *supra* note 26, at 99–101.

⁷⁰ See Bill of Complaint at 7–8, *United States v. Chi. Base Ball Club*, No. 19026 (C.C.N.D. Ill. May 27, 1884).

⁷¹ See *City of Chicago v. Ward*, 169 Ill. 392, 421, 48 N.E. 927, 936 (1897).

⁷² See Bill of Complaint at 15, *Illinois v. Balt. & Ohio R.R.* (C.C.N.D. Ill. Oct. 28, 1882); Cremin, *supra* note 26, at 101.

⁷³ 3 J. SEYMOUR CURREY, CHICAGO: ITS HISTORY AND ITS BUILDERS 359 (1912); see also *Ward v. Cong. Constr. Co.*, 99 F. 598 (7th Cir. 1900) (dissolving injunction against expansion of the temporary post office).

⁷⁴ A proposal to build a power house for the Exposition Building also generated a legal challenge. Cremin, *supra* note 26, at 161–62. The challenge came from Warren Leland in 1889, joined later by Sarah Daggett. *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79 (Cook County, Ill., Cir. Ct. 1892); see *infra* Parts III and IV.B.

then had assumed active oversight of the harbor facilities. As a result, the fair was held in Jackson Park, on Chicago's South Side.⁷⁵

The Columbian Exposition nevertheless had a significant impact on the future of Lake Park. One activity affiliated with the fair was the World's Congress Auxiliary, an ambitious program of several thousand lectures open to the public and delivered by scholarly, literary, and religious figures.⁷⁶ The organizers decided that the venue for the lectures should be Lake Park.⁷⁷ After much jockeying, it was also decided that the Inter-state Exposition Building would be torn down, and a new building in the neoclassical style associated with the fair would be built in its place to host the program.⁷⁸ After the Columbian Exposition ended, the building would become the new home of the Art Institute of Chicago.⁷⁹

There was great pressure to have the new building ready for the opening of the Columbian Exposition, and several Michigan Avenue landowners consented to the project. Nevertheless, litigation brought by Sarah Daggett delayed its completion.⁸⁰ The issue was eventually resolved in favor of the City and the Art Institute, and the new structure was sufficiently complete to be used as a venue for lectures in the summer of 1893.⁸¹

The Columbian Exposition also had indirect impacts on the park. In order to accommodate the huge number of visitors to the fair, the Illinois Central built a new terminal south of the park, between Park Row and 12th Street, called the Illinois Central Station.⁸² After the Exposition closed, this became the Illinois Central's principal intercity passenger depot in Chicago, effectively ending the railroad's quest to use north Lake Park as a site for an enlarged depot.⁸³ The Columbian Exposition also gave rise to new enthusiasm for the creation of large cultural institutions in the City, including the Field Museum of Natural History.⁸⁴

One institution that emerged at this time and deserves note was the Chicago Public Library, which was authorized to occupy space previously known as Dearborn Park, just west of Michigan Avenue between Randolph Street and Washington Street. This space had been included as part of the "public ground" on the Fort Dearborn Addition map that was "for ever to

⁷⁵ Cremin, *supra* note 26, at 129–46.

⁷⁶ *Id.* at 156–64, 182–93.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See infra* Part IV.B.

⁸¹ Cremin, *supra* note 26, at 163–65, 185.

⁸² STOVER, *supra* note 60, at 217–20.

⁸³ After 1919, when the Illinois Central agreed to electrify the tracks north of Park Row, *see infra* note 117, the north end of the park was served only by commuter trains.

⁸⁴ *See infra* notes 93–94 and accompanying text.

remain vacant of buildings.”⁸⁵ It had served for years as one of the few green spots west of Michigan Avenue. Nevertheless, consents were readily obtained from abutting landowners to use Dearborn Park as a site for the library, which was constructed in the same austere neoclassical style as the Art Institute.⁸⁶

C. Lake Park Becomes Grant Park

The mid-1890s marked a critical turning point for Lake Park. In 1892, the U.S. Supreme Court issued the first of four decisions that resolved the legal uncertainty about the title to Lake Park.⁸⁷ The Court’s most important determination was that the State of Illinois owned the bed of Lake Michigan.⁸⁸ Thus, the state legislature had the ultimate say over how this submerged land would be used. The Court also held that land beneath the lake was held by the State in trust for the public, and that the State could not dispose of the land in a way that would impair the public’s access to the lake or free navigation on the lake.⁸⁹ Collectively, the Court’s decisions extinguished any hope on the part of the Illinois Central—or any other private enterprise—that it could control the future development of the lakefront.

This period was also critical because of the powerful impression that the Columbian Exposition created on the public imagination. Under the guiding hand of Daniel Burnham, Chicago had built a magical “White City” in Jackson Park, about six miles south of Lake Park, featuring large neoclassical buildings, public plazas, and monumental statuary (see Figure 6).⁹⁰ Not surprisingly, after the question of title to Lake Park was resolved, the White City served as a model for how the park might be reconstructed.

⁸⁵ See *supra* Figure 3.

⁸⁶ The library directors obtained consents from the owners of property that abutted Dearborn Park in the horseshoe fronting Washington Street, Garland Court, and Randolph Street. At that time, Ward’s property did not directly front Washington Street (it was one lot to the south), and thus Ward was not approached to sign the consent. The Chicago Public Library has retained the consent form, along with a list of abutting property owners detailing the lots that each owned. See Owners of Lots Abutting on Dearborn Park (July 14, 1890), in Chicago Public Library Archives: Property Records Dearborn Park Property 1935–1898 Box 1, available at Harold Washington Library (on file with authors). No property owners south of Washington Street objected to this procedure, even though under the Illinois Supreme Court’s subsequent decisions in *Ward III* and *IV* the library arguably should have obtained the consent of all property owners along Michigan Avenue. See *infra* Part V.C (discussing the proper set of owners who must consent).

⁸⁷ *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *United States v. Ill. Cent. R.R.*, 154 U.S. 225 (1894); *Ill. Cent. R.R. v. City of Chicago*, 176 U.S. 646 (1900); *Illinois v. Ill. Cent. R.R.*, 184 U.S. 77 (1902).

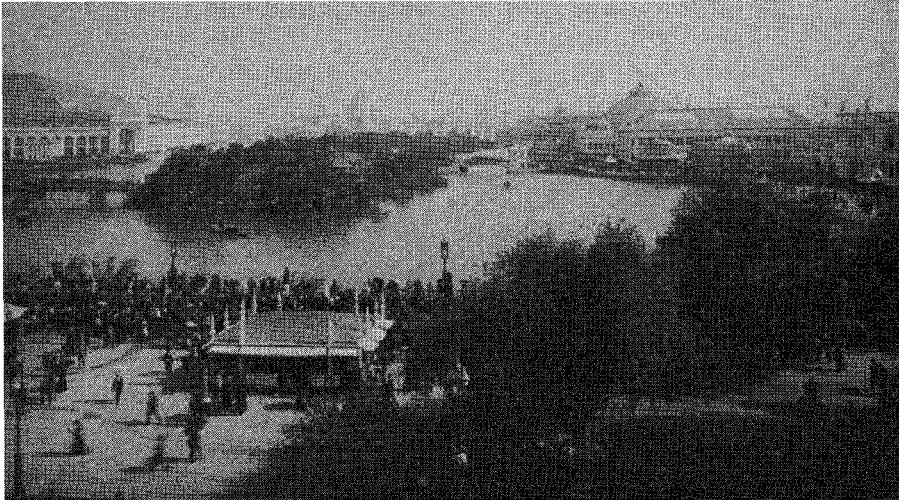
⁸⁸ *Ill. Cent. R.R.*, 146 U.S. at 452.

⁸⁹ *Id.*

⁹⁰ See 1 A HISTORY OF THE WORLD’S COLUMBIAN EXPOSITION HELD IN CHICAGO IN 1893, at 134–80, 352–53, 364 (Rossiter Johnson ed., 1897). For a popular account of the fair and its impact on the City, emphasizing Burnham’s role, see ERIK LARSON, THE DEVIL IN THE WHITE CITY (2003).

Chicago's business and cultural elite proceeded to draw up numerous plans for redevelopment of the lakefront, most of which took the White City as their inspiration.⁹¹ The most influential of these plans, not coincidentally, were authored by Burnham himself.

FIGURE 6: "BIRD'S EYE VIEW OF THE LAGOON AREA AT THE WORLD'S COLUMBIAN EXPOSITION 1893"⁹²



The culmination of this planning process was the *Plan of Chicago*, published by Burnham and his designated successor, Edward H. Bennett, in 1909.⁹³ Burnham and Bennett's *Plan* was a dazzling utopian vision, featuring a greatly enlarged lakefront park as its focal point. The park would be flanked by huge piers reaching out into the lake, with a large oval harbor for yachts in the middle (see Figure 7). Marshall Field had promised to fund a splendid natural history museum, which Burnham and others envisioned would be the centerpiece of the park. A new Crerar Library, also funded by a major bequest, would also be added to the park.⁹⁴

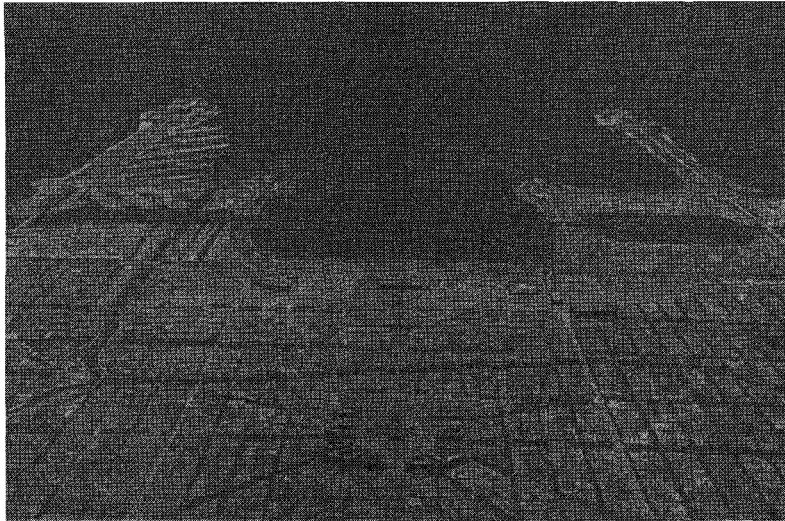
⁹¹ Cremin, *supra* note 26, at 206–07.

⁹² On file with Chicago History Museum ICHI-62403.

⁹³ DANIEL H. BURNHAM & EDWARD H. BENNETT, *PLAN OF CHICAGO PREPARED UNDER THE DIRECTION OF THE COMMERCIAL CLUB DURING THE YEARS MCMVI, MCMVII, AND MCMVIII* (Charles Moore ed., 1909). See generally CARL SMITH, *THE PLAN OF CHICAGO: DANIEL BURNHAM AND THE REMAKING OF THE AMERICAN CITY* (2006) (detailing the roles of Burnham and Bennett in the development of the *Plan*).

⁹⁴ For the various proposals for the Field Museum and Crerar Library, see GILFOYLE, *supra* note 7, at 21–30.

FIGURE 7: BURNHAM'S "PLAN OF CHICAGO" RENDERING LOOKING EAST TOWARDS PROPOSED HARBOR AND PIERS (1909)⁹⁵



With the Chicago elite solidly behind the Burnham Plan,⁹⁶ the Chicago City Council enacted ordinances in 1895 and 1896 designed to make the plan a reality, and the Illinois legislature adopted legislation confirming these measures.⁹⁷ The ordinances called for a massive landfilling project, covering the area from the Illinois Central tracks east to the harbor line established by the U.S. Army. Reflecting anxiety about social unrest associated with the Pullman Strike, which had been suppressed by federal troops bivouacked in Lake Park,⁹⁸ the ordinances provided that the newly filled area north of Monroe Street would be transferred to the State for purposes of constructing an armory and parade ground for the Illinois

⁹⁵ On file with Chicago History Museum ICHI-39070.

⁹⁶ See Letter from Daniel Burnham to John B. Sherman (Apr. 7, 1897), available at <http://www.encyclopedia.chicagohistory.org/pages/410027.html> ("Your friend Mr. Armour, and Mr. Pullman, and everyone else, so far as I know, is enthusiastic for its immediate accomplishment, except Joe[] Donnersberger, who is sour, and jealous and ridiculous.").

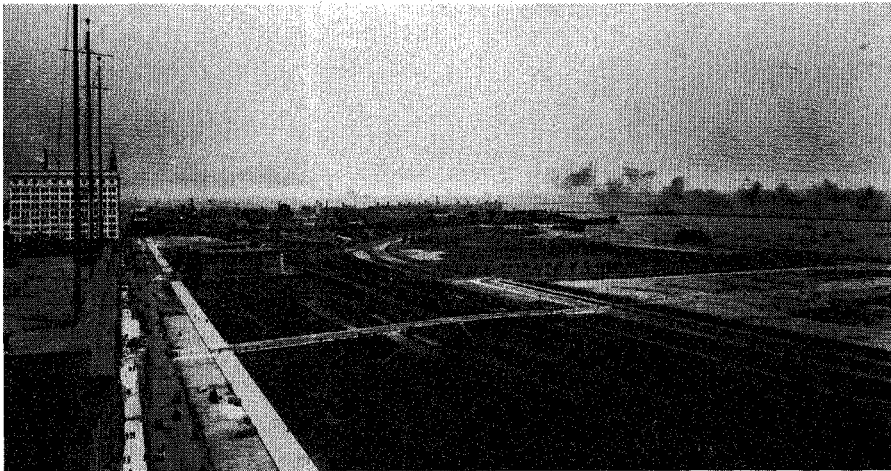
⁹⁷ See Chi., Ill., Ordinance Providing for a Settlement of the Lake Front Park Question (Oct. 21, 1895), in JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO FOR COUNCIL YEAR 1895, at 1138-45 (1895); Chi., Ill., Ordinance Turning over the Control of a Part of the Lake Front to the South Park Commissioners (July 27, 1896), in JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO FOR THE COUNCIL YEAR 1896, at 783-85 (1896). The ordinances were accepted by the Illinois General Assembly. See 1897 Ill. Laws 32; see also *Filling for the Lake-Front Park*, CHI. TRIB., May 31, 1897, at 6; *Ready for Rapid Work*, CHI. TRIB., Nov. 24, 1895, at 8.

⁹⁸ See DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 20-37 (1999); see also ALMONT LINDSEY, THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL 203-38 (Phoenix Books 1964) (1942).

National Guard.⁹⁹ The southern portion of the park would be transferred to the South Park Commissioners (SPC) for development into a formal park and sites for museums, libraries, and other civic and cultural buildings.¹⁰⁰ Finally, in 1899, the entire area was renamed "Grant Park" in honor of President (and one-time Illinois resident) Ulysses S. Grant.¹⁰¹

Armed with this authority, the SPC quickly set about filling in the lake east of the Illinois Central tracks. Between 1896 and 1906, the commissioners engaged in steady landfill activity, starting with about six acres per year in the first half of the decade and accelerating to double and triple that rate in the second half.¹⁰² By 1906, more than 128 acres of new land had been created.¹⁰³ One can get a sense of this development from Figure 8.

FIGURE 8: "MICHIGAN AVENUE. BIRD'S EYE VIEW NORTH FROM HARRISON STREET 1913," SHOWING LANDFILL AND THE ART INSTITUTE AS THE ONLY BUILDING IN GRANT PARK¹⁰⁴



As to the contemplated division between military facilities to the north and cultural activities in the south, the plans of the South Park Commissioners and their lead architects, Burnham and Bennett, were almost entirely frustrated by Montgomery Ward. The first *Ward* case, decided in 1897, spared the Art Institute on the understanding that all

⁹⁹ See *infra* Parts IV.C and IV.D. For a description of proposed armory construction, see *Park in the Lake*, CHI. TRIB., Jan. 14, 1894, at 1.

¹⁰⁰ See *supra* notes 90–94 and accompanying text.

¹⁰¹ 1899 Ill. Laws 328.

¹⁰² Cremin, *supra* note 26, at 249.

¹⁰³ *Id.*

¹⁰⁴ On file with Chicago History Museum ICHi-18353.

landowners had consented to its construction.¹⁰⁵ But *Ward I* sounded the death knell for all other permanent structures in the original Lake Park, including armories, railroad depots, and post offices. *Ward II*, handed down in 1902, killed the plan to use the newly filled land east of the Illinois Central tracks for a training facility for the National Guard.¹⁰⁶ *Ward III*¹⁰⁷ and *IV*,¹⁰⁸ decided in 1909 and 1910 respectively, eliminated the possibility of using the park as a site for either the Field Museum or the Crerar Library.

The cumulative effect of the four *Ward* decisions was to leave a huge vacant space in the center of the much enlarged Grant Park. Under some circumstances, this would have caused a complete rethinking of the lakefront's future. But the tremendous momentum built up behind the Burnham Plan, with its animating vision grounded in what would come to be called the "City Beautiful Movement," could not be deflected.¹⁰⁹ Implementation of the Burnham Plan moved ahead under the guiding hand of Edward Bennett, but the multiple cultural institutions contemplated for the center of the park were relegated to the periphery. A site for the Field Museum was secured on 12th Street, just south of the area protected by the *Ward* cases.¹¹⁰ A site for the Crerar Library was found on the west side of Michigan Avenue, again just outside the protected area.¹¹¹ Other museums and cultural buildings—the Public Library, the Auditorium Building, Orchestra Hall, the Shedd Aquarium, the Adler Planetarium—would all be erected just outside the perimeter of the park, either on the west side of Michigan Avenue or south of 12th Street. One of the piers contemplated by the Burnham Plan was eventually constructed—the enormous 3000-foot Navy Pier, north of the park area. One of the offshore islands contemplated by the plan—the so-called Northerly Island—was created and eventually became an airport and then a nature preserve.¹¹² In a direct echo of the

¹⁰⁵ *City of Chicago v. Ward*, 169 Ill. 392, 421, 48 N.E. 927, 937 (1897) ("The only permanent building, perhaps, that is excepted from the injunction is the Art Institute, and all the property owners gave their consent to its erection.").

¹⁰⁶ *Bliss v. Ward*, 198 Ill. 104, 64 N.E. 705 (1902).

¹⁰⁷ *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N.E. 731 (1909).

¹⁰⁸ *S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1910).

¹⁰⁹ The City Beautiful Movement took its inspiration from the Columbian Exposition; it stressed an integrated plan of buildings, parks, and walks, typically in a neoclassical style, as a corrective for haphazard urbanization. See WILLIAM H. WILSON, *THE CITY BEAUTIFUL MOVEMENT* 53–74 (1989); SMITH, *supra* note 93, at 14–15, 67, 154. The movement was actively promoted by the Chicago Commercial Club. J. THEODORE FINK, *GRANT PARK TOMORROW: FUTURE OF CHICAGO'S FRONT YARD* 74–79 (1979); GILFOYLE, *supra* note 7, at 43.

¹¹⁰ *People To Own the Shore; Field Museum at 12th Street*, CHI. TRIB., Dec. 12, 1911, at 1.

¹¹¹ *Crerar Library Is Dedicated in Boulevard Home*, CHI. TRIB., May 29, 1921, at 14.

¹¹² *Northerly Island*, CHI. PARK DISTRICT, http://www.chicagoparkdistrict.com/index.cfm/fuseaction/parks.detail/object_id/5235d96e-2f1c-4c63-80b7-c9e7c589e0ba.cfm (last visited Aug. 14, 2011).

original plan, two yacht clubs were allowed to locate at the foot of the park, with their boathouses perched on pilings in the lake.¹¹³

The otherwise vacant park was landscaped in accordance with the neoclassical dictates favored by Bennett, a graduate of the École des Beaux Arts. Like the gardens at Versailles, the park was divided into large rectangles joined by long walkways. Eventually the rectangles were filled in with trees, shrubs, neoclassical concrete balustrades, fountains, and statuary. Other than the Art Institute, which exploited the original consents given by the Michigan Avenue landowners by continually expanding to the east, no buildings graced the park other than a few comfort stations and a solitary band shell. In the summer, the park served as a gathering place for collective celebrations, such as Fourth of July pageantry, an art fair, and free concerts. But for most of the year, it stood relatively empty.¹¹⁴

Nature is said to abhor a vacuum. If the huge space that was Grant Park could not be occupied with buildings, it could be filled with automobiles. Over the course of the twentieth century, Grant Park was crisscrossed by multilane roadways. Lake Shore Drive and Columbus Drive ran through the park north and south; Monroe Street, Jackson Street, Congress Parkway, and Balbo Avenue ran east and west through all or part of the park. The landfill area east of the railroad tracks and north of Monroe Street, which was slated in the 1896 ordinance to become a National Guard armory and training ground, became a vast outdoor parking lot.¹¹⁵ After World War II, the parking gradually moved underground; eventually much of Grant Park would be perched on top of four huge underground parking structures.¹¹⁶ Like much of the rest of America, Grant Park was created by the railroad but came to be dominated by the automobile.

The transformation of Grant Park from a railroad-centered to an automobile-centered space received its legal imprimatur in the so-called Lake Front Ordinance of 1919.¹¹⁷ This law reflected an agreement worked

¹¹³ See *McCormick v. Chi. Yacht Club*, 331 Ill. 514, 163 N.E. 418 (1928); *Stevens Hotel Co. v. Chi. Yacht Club*, 339 Ill. 463, 171 N.E. 550 (1930).

¹¹⁴ GILFOYLE, *supra* note 7, at 22–29, 43–49.

¹¹⁵ Chi., Ill., Ordinance Turning over the Control of a Part of the Lake Front to the South Park Commissioners (July 27, 1896), in *JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO FOR THE COUNCIL YEAR 1896*, at 783–85 (1896); GILFOYLE, *supra* note 7, at 26–27.

¹¹⁶ GILFOYLE, *supra* note 7, at 32–42, 166, 369. The four garages are Grant Park North Garage, completed in 1954 with a capacity of 2359 cars (1850 now); Grant Park South Underground Garage (now Grant Park South Garage), completed in 1965 with a capacity of 1241 cars (1350 now); Monroe Street Underground Garage (now East Monroe Street Garage), completed in 1977 with a capacity of 3700 cars (3850 now); and Millennium Park Garage completed in 2002, with a capacity of 2181 cars (2126 now). See *id.*; MILLENNIUM GARAGES, <http://www.millenniumgarages.com> (last visited Aug. 14, 2011).

¹¹⁷ See Chi., Ill., Ordinance for the Establishment of Harbor District Number Three; the Construction by the Illinois Central Railroad Company of a New Passenger Station; Electrification of Certain of the Lines of the Illinois Central and Michigan Central Railroad Companies Within the City;

out among the City of Chicago, the Illinois Central Railroad, the SPC, and the Secretary of War, who exercised control over the harbor. Most significantly for present purposes, the railroad agreed to depress its tracks nine to fourteen feet underground, to electrify its trains so as to eliminate noise and air pollution, and to construct viaducts for auto traffic crossing over its right-of-way.¹¹⁸ Two years later, the State and the U.S. Army agreed to extend Grant Park 300 feet farther into the lake using new landfill, in order to accommodate the construction of Lake Shore Drive.¹¹⁹ This in turn required demolishing and rebuilding the yacht clubs beyond the extended boundary of the park.¹²⁰ As a result of these changes, the railroad began receding from view in the park—and automobile traffic gradually rose from a trickle to a torrent.

With the addition of Lake Shore Drive along its eastern edge and the construction of the museums south of 12th Street, the boundaries of Grant Park were finally fixed. For the balance of the twentieth century, the *Ward* cases deterred any attempt to construct within the area of the park any structure that could unambiguously be described as a building. The century would witness many legal actions brought or threatened by Michigan Avenue landowners. But these related primarily to issues defining the outer limits of the dedication, such as continued expansion of the Art Institute, reconstruction of the yacht clubs, and proposals to build a new band shell.¹²¹

This equilibrium was disrupted by the Millennium Park project at the dawn of the twenty-first century. As originally conceived, the Millennium Park project was consistent with the *Ward* precedents. The basic idea was to cover over the area in the northwest corner of Grant Park where rail passenger operations—now part of the Metra commuter rail system—remained exposed; construct a new underground parking garage; and use the revenues from the parking fees to fund surface landscaping and a new band shell.¹²²

As the Millennium Park project progressed, cost estimates for the underground garage soared and augmenting donations were sought from wealthy Chicago families.¹²³ The families responded positively but wanted their largesse associated with permanent monuments added to the park. The Pritzker family agreed to fund a new band shell, provided that it was designed by architect Frank Gehry.¹²⁴ Renamed a “music pavilion,” the

and the Development of the Lake Front (July 21, 1919), in JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO FOR THE COUNCIL YEAR 1919, at 969–89 (1919).

¹¹⁸ *Id.* at 971–79.

¹¹⁹ *Stevens Hotel Co. v. Chi. Yacht Club*, 339 Ill. 463, 467–68, 171 N.E. 550, 552 (1930).

¹²⁰ *Id.*

¹²¹ See *infra* Parts V.A and V.B.

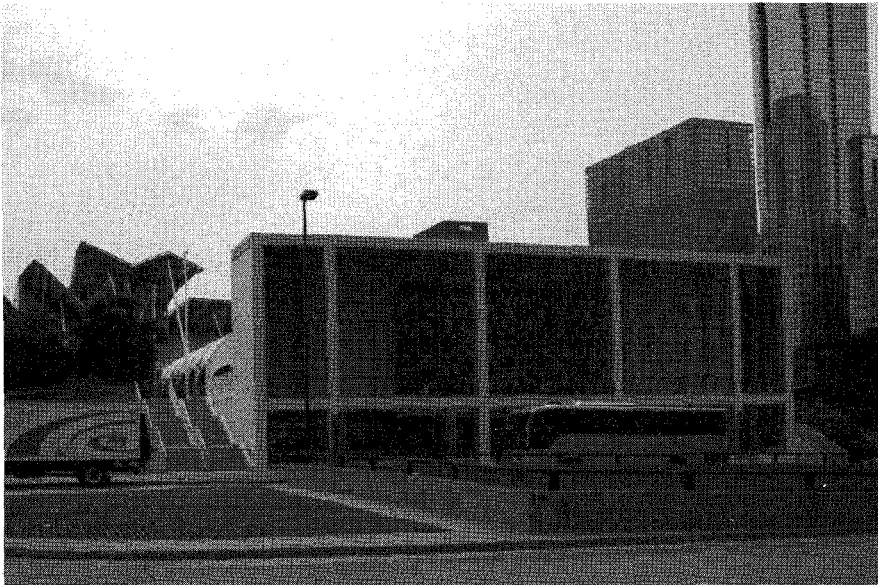
¹²² GILFOYLE, *supra* note 7, at 147–74, 319–40.

¹²³ *Id.* at 107–29.

¹²⁴ *Id.* at 129.

design for this structure became more and more elaborate until it could scarcely be described as a mere band shell.¹²⁵ The Harris family agreed to pay for a new theater for music and dance.¹²⁶ The theater would be constructed underground, but required a two-story glass and steel entrance above ground (see Figure 9).

FIGURE 9: HARRIS THEATER ENTRANCE IN MILLENNIUM PARK
ALONG RANDOLPH STREET (2010)



With these additions to the plan, the tension with the *Ward* cases could no longer be ignored.¹²⁷ Attorneys for the Millennium Park project obtained consents for construction of these and other structures from property owners who owned land on Michigan Avenue and Randolph Street abutting the northwest corner of Grant Park. A Cook County Circuit Court judge ruled that these consents, patterned after those secured in 1891 to build the Art Institute, eliminated any constraint associated with the *Ward* precedents.¹²⁸

Whatever its aesthetic merits or demerits, Millennium Park succeeded, for the first time, in drawing large crowds to a portion of the park on a

¹²⁵ *Id.* at 194.

¹²⁶ *Id.* at 135–46.

¹²⁷ *Id.* at 141.

¹²⁸ See *Boaz v. City of Chicago*, No. 99L-3804 (Cook County, Ill., Cir. Ct. Jan. 14, 2000); GILFOYLE, *supra* note 7, at 141–43.

consistent basis.¹²⁹ The Art Institute quickly followed up with another addition—its largest yet—linked to Millennium Park by a long pedestrian bridge over Monroe Street.¹³⁰ Recently the City proposed that a new children’s museum be added to the park.¹³¹ Although this immediately elicited objections from Michigan Avenue property owners,¹³² the momentum has clearly shifted toward adding new physical structures to the park, leaving the legacy of the *Ward* precedents in doubt.

II. THE AMERICAN DOCTRINE OF PUBLIC DEDICATION

Everyone relies on public spaces. We rely on the streets on which we live remaining public thoroughfares, the alleys behind our homes remaining accessible to service vehicles, and the parks down the block remaining open and accessible places for recreation. Today, the primary protection of these expectations is the political process. State and local statutes typically require public notice and other procedural formalities before public spaces can be closed or sold, giving affected individuals an opportunity to vocalize their objections.¹³³ In some instances, roadways and open spaces may be protected by easements or by covenants running with the land. But these sources of protection are exceptional insofar as government-owned spaces such as roads and parks are involved. Moreover, easements and covenants typically require formal writings, incorporated into deeds, before they can be enforced against successors in interest.¹³⁴

¹²⁹ The park was expected to have a baseline attendance of 3 million visitors in 2005, with 3.3–3.65 million visitors in 2010 and 3.66–4.4 million visitors in 2015. GOODMAN WILLIAMS GROUP, MILLENNIUM PARK ECONOMIC IMPACT STUDY 5 (2005), available at http://www.chicagooloopalliance.com/db_images/includes/227Millennium_Park_Economic_Impact_Study_20050503.pdf. The park exceeded expectations, with 4 million visitors in 2009 and 4.5 million visitors in 2011. *Crain’s List Chicago’s Largest Tourist Attractions (Sightseeing)*, CRAIN’S CHI. BUS., Mar. 22, 2010, at 21; *Crain’s List Largest Tourist Attractions*, CRAIN’S CHI. BUS., Mar. 28, 2011, at 24.

¹³⁰ *Art Institute Addition Set To Open in May*, CHI. TRIB., July 18, 2008, § 2 (Metro), at 3.

¹³¹ Press Release, Mayor’s Press Office, Chicago Children’s Museum Moving to Grant Park (Sept. 27, 2006) (on file with authors).

¹³² A lawsuit was filed challenging the procedure by which the Chicago Plan Commission and the City Council approved the museum in Grant Park. See Complaint for De Novo Judicial Review of and to Void a Chicago Zoning Amendment, *Figiel v. Chi. Plan Comm’n*, No. 08-CH-32919 (Cook County, Ill., Cir. Ct. Sept. 5, 2008). After the court ruled in favor of the museum, Figiel appealed and lost. *Figiel v. Chi. Plan Comm’n*, 408 Ill. App. 3d 223, 945 N.E.2d 71 (2011). This was an administrative law challenge to the approval process. See *id.* at 229, 945 N.E.2d at 76. In the event that construction begins, property owners will likely bring suit challenging the construction under the *Ward* precedents.

¹³³ See, e.g., 60 ILL. COMP. STAT. 1/30–50 (2008) (requiring for the sale of public land valued at more than \$2500 a resolution of township trustees, an appraisal, and notice to the public); 765 ILL. COMP. STAT. 205/6 (2008) (providing that vacating plats, a procedure in which the legal effect of a plat is nullified, requires consent of the city, village, or county and of any owners who have bought lots in the plat).

¹³⁴ JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 3:1–2 (2010); Charles E. Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants*, 32 YALE L.J. 123, 124 (1922).

Protecting reliance interests in public spaces is a particularly difficult problem where new communities or subdivisions are involved. In the nineteenth century, entire towns and cities regularly sprang into existence where no organized settlement had previously existed. The promoters of these new communities would often display maps or plats indicating that lots offered for sale would be made accessible by roads and streets, and would be favored with nearby public squares or parks.¹³⁵ Prospective purchasers would rely on these representations in deciding whether to purchase and how much to pay for particular lots.¹³⁶

The actions of the Board of Commissioners of the Illinois and Michigan Canal, in referring to maps indicating that land to the east of Michigan Avenue would remain "forever Open, Clear & free of any buildings,"¹³⁷ and the actions of the agents of the federal government, in recording a map stating that land east of Michigan Avenue would forever "remain vacant of buildings,"¹³⁸ were therefore representative of a much larger problem. There were no Illinois precedents regarding the legal consequences of such representations when Michigan Avenue lots were first purchased after 1836 and 1839.¹³⁹ There was, however, a growing body of precedent from other jurisdictions—including several prominent decisions of the U.S. Supreme Court.¹⁴⁰ A legally sophisticated purchaser would have been encouraged by these precedents to assume that the restrictions appearing on the maps of fractional sections 15 and 10 would be legally enforceable by those who had purchased property on the west side of Michigan Avenue.

The restrictions noted on these maps, perhaps because it was assumed that they were legally enforceable, set in motion strong expectations about what would come to be called Lake Park and later Grant Park. These

¹³⁵ See Lewinnek, *supra* note 28, at 197–98.

¹³⁶ See *id.*; see also HOLLAND, *supra* note 28, at 61–65.

¹³⁷ See *supra* notes 27–31 and accompanying text (including Figure 2).

¹³⁸ See *supra* notes 32–36 and accompanying text (including Figure 3).

¹³⁹ There was a plat statute that prescribed a procedure by which municipal authorities could take title to dedicated roads and public spaces. See 1833 Ill. Laws 599. Compliance with this procedure gave rise to what were later called "statutory dedications," although the Illinois courts continued to recognize "common law dedications" where the statute was not followed. See, e.g., *Chi., Rock Island, & Pac. R.R. v. City of Joliet*, 79 Ill. 25 (1875); see generally 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 628, at 738–39 (4th ed. 1890). Substantively, there was no difference between statutory and common law dedications in Illinois. *City of Joliet*, 79 Ill. at 32–33; DILLON, *supra*, at 739 n.1. The only difference lay in the difficulty of proving the existence of a dedication. Statutory dedication created a safe harbor in which only one piece of evidence was required: compliance with the statute. Common law dedication often required difficult inquiries into the behavior of individuals, officials, and the general public over time.

¹⁴⁰ See *City of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 431 (1832) (recognizing public dedication of commons in Cincinnati); *Barclay v. Howell's Lessee*, 31 U.S. (6 Pet.) 498 (1832) (recognizing public dedication of street in Pittsburgh); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836) (recognizing public dedication of quay in New Orleans).

expectations, in turn, were reflected in the Chicago real estate market. Throughout most of Chicago's history, lots abutting Michigan Avenue have sold for a premium relative to lots on streets farther from the lake.¹⁴¹ Local residents have been keenly aware of this, and have identified the direct exposure to Lake Michigan enjoyed by owners on Michigan Avenue as the reason for the price differential.¹⁴²

A. A Unique American Hybrid

American courts in the nineteenth century developed a potent doctrine for protecting expectations about public spaces, generally known as the law of public dedication. The doctrine, at least as it applied to public spaces, is "of ambiguous origin."¹⁴³ Scattered English precedents had recognized the dedication of public roads.¹⁴⁴ But there is no evidence that English courts extended the idea of public dedication to public spaces such as parks or squares. The first known American court to apply public dedication reasoning to protect a public space, the Vermont Supreme Court, analogized the issue to the dedication of land to pious uses, a doctrine with roots in civil and canon law.¹⁴⁵

Close on the heels of the Vermont decision came the most influential precedent in establishing public dedication of public spaces, the U.S. Supreme Court's 1832 decision in *Cincinnati v. White*.¹⁴⁶ John Cleves

¹⁴¹ See HOYT, *supra* note 24, at 128–95. Lots in this vicinity sold at prices up to ten times higher than those sold a few blocks away. *Id.* at 187. Interestingly, testimony in the *Ward* cases indicates that when Ward purchased his land in 1887, prices for land on Wabash Avenue, one block west of Michigan Avenue, were higher. Transcript of Record, *supra* note 4, at 294–95 (testimony of William C. Thorne). This may have been because the dominant land use along Michigan Avenue after the 1871 fire changed from residential to commercial uses such as liverys and saloons. Wabash was closer to the center of commercial activity in the City, and hence may have been a more desirable location for such activities. In time, land use along Michigan evolved again, toward hotels, private clubs, public buildings such as the Auditorium Theater and Orchestra Hall, and high-end retail shops. With this further transformation, the Avenue again enjoyed a price premium over blocks to the west. See generally HOYT, *supra* note 24, at 178–90.

¹⁴² Transcript of Record, *supra* note 4, at 287–88 (testimony of William C. Thorne).

¹⁴³ *Abbott v. Cottage City*, 10 N.E. 325, 328 (Mass. 1887); accord 11A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 33:1, at 422 n.1 (3d ed. 2009).

¹⁴⁴ *Appleton v. City of New York*, 114 N.E. 73, 77 (N.Y. 1916) (citing a 1713 English decision). For other cases, see *Wood v. Veal*, (1822) 106 Eng. Rep. 1257; 5 B. & Ald. 454; *Jarvis v. Dean*, (1826) 130 Eng. Rep. 585; 3 Bing. 447.

¹⁴⁵ *Abbott v. Mills*, 3 Vt. 521, 527 (1831). Under the doctrine of dedication to pious uses, land donated to a church for church purposes would be held in the name of the minister for the use of the church. In the event of a vacancy, the title would be held in abeyance. The minister could not transfer title to the land without the consent of the members of the church. See, e.g., *Weston v. Hunt*, 2 Mass. (2 Tyng) 500 (1807).

The Louisiana Supreme Court anticipated the public dedication doctrine in an 1822 case in which abutting owners were granted an injunction against construction on a public square, but the court did not invoke public dedication reasoning. See *Mayor of New Orleans v. Gravier*, 11 Mart. (o.s.) 620 (1822).

¹⁴⁶ 31 U.S. (6 Pet.) 431 (1832).

Symmes, who had a habit of selling the same property twice,¹⁴⁷ conveyed land to three individuals who proceeded to lay out a plan for the town of Cincinnati. Their plan showed a tract along the Ohio River, set apart as a common "for the use and benefit of the town forever."¹⁴⁸ Symmes later conveyed the same riverfront tract by another deed, which passed after several conveyances to one White, who sued to gain possession of the tract.¹⁴⁹ The Court held that the original restriction was a valid public dedication, notwithstanding its failure to satisfy the elements of a conventional grant.¹⁵⁰ The subsequent conveyance of the same tract in fee to another could not defeat the purpose of this dedication, which was "for the public use, and the convenience and accommodation of the inhabitants of Cincinnati."¹⁵¹

The Court in *White* acknowledged the difficulties presented by the fact that no grantee had taken title to the land under the original plan, and there was no written conveyance that would satisfy the statute of frauds.¹⁵² Following the lead of the Vermont Supreme Court, however, it relied on donation-to-pious-uses cases,¹⁵³ as well as English highway cases,¹⁵⁴ to show that other courts had recognized exceptions to overcome these difficulties. The Court concluded that "[i]f this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses."¹⁵⁵

After *White*, the use of public dedication theory to protect public spaces spread rapidly.¹⁵⁶ Initially, some older states on the eastern seaboard resisted the new doctrine.¹⁵⁷ But even these states came to accept public dedication of public spaces.¹⁵⁸ The resulting doctrine was a unique

¹⁴⁷ See *Lessee of Ewing v. Burnet*, 36 U.S. (11 Pet.) 41 (1837) (a famous adverse possession case involving land sold twice by Symmes, also in Cincinnati).

¹⁴⁸ *White*, 31 U.S. at 431.

¹⁴⁹ *Id.* at 433.

¹⁵⁰ *Id.* at 442–44.

¹⁵¹ *Id.* at 438.

¹⁵² See *id.* at 438–39.

¹⁵³ *Id.* at 436–37 (citing *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566 (1829); *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815)).

¹⁵⁴ *Id.* at 439 (citing *Jarvis v. Dean*, (1826) 130 Eng. Rep. 585; 3 Bing. 447).

¹⁵⁵ *Id.* at 437–38.

¹⁵⁶ Relying on *White*, Louisiana adopted the doctrine in 1833, see *De Armas v. Mayor of New Orleans*, 5 La. 132, 148 (1833), and Ohio the year after that, see *Brown v. Manning*, 6 Ohio 298, 303 (1834).

¹⁵⁷ Massachusetts and New York initially rejected the idea. See *Hinckley v. Hastings*, 19 Mass. (2 Pick.) 162 (1824); *Pearsall v. Post*, 20 Wend. 111 (N.Y. 1838).

¹⁵⁸ See *Abbott v. Cottage City*, 10 N.E. 325, 328 (Mass. 1887); *Cady v. Conger*, 19 N.Y. 256 (1859).

American hybrid¹⁵⁹—one that provided powerful protection for public spaces.¹⁶⁰

Viewed from the perspective of property law doctrines familiar today, the nineteenth-century public dedication doctrine seems highly peculiar.¹⁶¹ On the one hand, the doctrine appears to recognize something functionally similar to a negative easement: a prohibition against modifying public spaces that runs with ownership of the abutting land. Ordinarily, negative easements can be created only by a written grant, typically in the form of a deed.¹⁶² Restrictions such as those contained in the maps of the Canal Commissioners and the United States would not qualify as negative easements, because they did not appear in deeds issued to purchasers of land.

On the other hand, the public dedication doctrine seems to embody an anomalous conception of public rights. We tend today to think of parks and other public spaces as being owned by governmental bodies. Public property means government property. The government, as owner, presumptively has all the rights and privileges associated with fee simple title as to how these properties will be managed, developed, and alienated.¹⁶³

¹⁵⁹ One nineteenth-century treatise remarks that the doctrine is “comparatively modern” and suggests that it came to be generally accepted only in the 1830s. EMORY WASHBURN, *A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES* 184–85 (3d ed. 1873). Although American courts naturally identified certain English highway-dedication precedents as antecedents, *see id.* at 184, the leading English treatise on easements contains no mention of the doctrine. *See* CHARLES JAMES GALE & W.J. BYRNE, *A TREATISE ON THE LAW OF EASEMENTS* (10th ed. 1925).

¹⁶⁰ A survey of the cases in 1877, many of them from Illinois, observed that “[t]he dedication of land is becoming a very important question in the jurisprudence of this country.” *Dedication of Lands—Estoppel in Pais*, 3 MONTHLY W. JURIST 641, 641 (1877).

¹⁶¹ The public dedication doctrine was recognized as peculiar even at the peak of its power. *See* DILLON, *supra* note 139, § 653a, at 774 (noting with approval how under the doctrine of public dedication “the ordinary rules of law relating to private rights have been modified and limited by the public convenience and necessities”).

¹⁶² English common law recognized only four types of negative easements—that is, rights of one landowner to require another landowner to desist or refrain from some use of his property. *See, e.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959); *United States v. Blackman*, 613 S.E.2d 442, 446 (Va. 2005). The right to keep adjacent land free of development was not among these rights. American courts have recognized a wider variety of negative easements, but only if they are created by written grant. *Fontainebleau*, 114 So. 2d at 359; 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34.01[3], 34.02[1] (Michael Allan Wolf ed., 2010). Because of these and other limits on negative easements, conservation easements—private negative servitudes running with the land that preclude development—have required special legislation authorizing their creation. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1039 (2007); *see also* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 470–79 (1984).

¹⁶³ There are, of course, various restrictions on the government’s discretion with respect to the disposition of parks and similar public property, including the public trust doctrine. But for any member of the public to bring a legal action challenging the government’s disposition of its property, it is

The public dedication doctrine, in contrast, suggests that certain public properties come with restrictions running in favor of particular private parties. This notion of private rights in public land seems alien in a world in which land is classified as being either public or private, with exclusion rights and control over uses being assigned to either public or private managers, respectively.

The most basic explanation for why American courts were able to devise such a curious hybrid doctrine is that public dedication cases were brought as actions for injunctive relief, and the courts hearing these actions regarded themselves as exercising the flexibility traditionally associated with courts of equity.¹⁶⁴ Equity was understood in the nineteenth century to protect only rights of property.¹⁶⁵ A public dedication did not create an easement or any other conventional property right; consequently, equity could not enforce a public dedication directly.¹⁶⁶ Nevertheless, equity would intervene to protect conventional property rights, such as lots and buildings, from indirect harms such as nuisances. Using similar reasoning, courts of equity concluded that they could intervene at the behest of owners of lots and buildings abutting a public dedication to protect these owners from the effects of a failure to comply with the terms of the dedication.¹⁶⁷ A public dedication was a commitment made with respect to public property that had an effect on abutting private property—an effect strong enough to warrant intervention by courts of equity at the behest of the private owner. Substantively, the unique hybrid doctrine that emerged can be seen as sharing some features of the law of contracts, some of equitable estoppel, some of easements by prescription, and some of the law of trusts.

necessary to satisfy standing requirements and then identify some legal constraint that the government has allegedly violated.

¹⁶⁴ See generally 1 JAMES L. HIGH & SHIRLEY T. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 60 (4th ed. 1905) (describing the broad flexibility of judges to grant injunctions under English equity law).

¹⁶⁵ See *Sheridan v. Colvin*, 78 Ill. 237, 247 (1875) (“The [chancery] court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests.”); HIGH & HIGH, *supra* note 164, § 20b, at 34–35; Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916). See generally Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295 (2001) (explaining the origins of the rule against prior restraints in terms of the understanding that equity would intervene only to protect property rights).

¹⁶⁶ The nineteenth-century cases did not refer to public dedications as “easements.” Much later, courts would sometimes use the word “easement” to describe public dedications, suggesting that they were a property right belonging to abutting property owners. See, e.g., *Stevens Hotel Co. v. Art Inst. of Chi.*, 260 Ill. App. 555, 558 (1931). This suggests that the original rationale for the public dedication doctrine was no longer familiar to courts in the twentieth century.

¹⁶⁷ See *People ex rel. Bransom v. Walsh*, 96 Ill. 232, 249 (1880) (recognizing that dedications affect the private parties’ interests in their own property).

As in the law of contracts, the creation of a public dedication proceeds on an offer-and-acceptance model. An owner of property “offers” to dedicate some portion of his property, through words or deeds, to the public. The offer is then “accepted,” either officially by the duly appointed representatives of the public (such as the town council) or by longstanding actions of the public in conformance to the dedication.¹⁶⁸ Courts repeatedly said that neither the offer nor the acceptance had to be in writing, but each could be inferred from the course of conduct of either the grantor or the public.¹⁶⁹ Of course, having the offer or the acceptance in writing made it much easier to establish a dedication.

As in the law of equitable estoppel, courts placed heavy emphasis on the reliance interests of those who acted or changed their position in response to a public dedication.¹⁷⁰ Most prominent here were the reliance interests of those who purchased land—typically at higher prices—on the understanding that adjacent land would remain subject to public use. Evidence of purchase at higher prices was routinely asserted in establishing the standing of abutting owners to sue in equity to enforce public dedications.¹⁷¹ Such evidence was also offered in actions brought by public authorities, perhaps to establish the requisite interference with property rights necessary to invoke the intervention of courts of equity.¹⁷²

As in the law of easements by prescription, courts enforcing public dedications emphasized longstanding use by the public to establish an implied offer to dedicate, an implied acceptance by the public, or reliance.¹⁷³ Like an easement by prescription, a dedication, once established, was regarded as irrevocable by the grantor.¹⁷⁴

¹⁶⁸ See DILLON, *supra* note 139, §§ 636, 642, at 751–52, 759–61. A dedication formally accepted following established procedures was called a statutory dedication; a dedication accepted instead by the actions of the public and public authorities was called a common law dedication. *Id.*

¹⁶⁹ See, e.g., *Marcy v. Taylor*, 19 Ill. 634 (1858) (public acceptance of dedication may be shown by actions of public over a period of time); *City of Alton v. Ill. Transp. Co.*, 12 Ill. 38 (1850) (public dedication established by reciprocal deeds); *Godfrey v. City of Alton*, 12 Ill. 29 (1850) (dedication of public landing on Mississippi River established by oral testimony).

¹⁷⁰ The Supreme Court in *City of Cincinnati v. Lessee of White* noted the close connection between public dedication and estoppel. 31 U.S. (6 Pet.) 431, 438 (1832). This in turn was repeated by courts and commentators. See, e.g., LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS 335 (1898). Nevertheless, there are important differences between dedication and estoppel. Dedication rests on an express or implied intention on the part of the grantor and runs to the public as well as to particular individuals. Estoppel does not turn on the intention of the grantor and runs only to individuals.

¹⁷¹ For examples of cases where evidence of purchase at higher prices was adduced, see *Village of Princeville v. Auten*, 77 Ill. 325 (1875); Bill of Complaint, *supra* note 72, at 10–11.

¹⁷² See *City of Jacksonville v. Jacksonville Ry.*, 67 Ill. 540, 542 (1873).

¹⁷³ See DILLON, *supra* note 139, §§ 631, 632, 637, at 743, 744–46, 753–54.

¹⁷⁴ See *City of Jacksonville*, 67 Ill. at 544. In this case, the town had been laid out to include a public square that was used as a park. The court held that the city was entitled to sue in equity on behalf of abutting owners and others to enjoin a state statute authorizing the construction of a railroad in the

Finally, as in the law of trusts, courts spoke frequently of governmental bodies, once they had accepted a dedication, as having assumed a trust obligation to preserve public spaces.¹⁷⁵ This obligation was owed especially to abutting property owners, who received special benefits from the dedication. But it was also routinely said to extend to the public more generally.¹⁷⁶

B. Questions Posed by Map Restrictions

Although there were no Illinois cases on public dedications in 1836 or 1839 (the dates of the maps preceding the first sales of Michigan Avenue land), the Illinois Supreme Court embraced the doctrine in 1850.¹⁷⁷ Soon Illinois courts were enforcing the doctrine with vigor, applying it to a variety of plat and map restrictions involving streets, landings, highways, and parks.¹⁷⁸ Thus, the central elements of the public dedication theory, including the understanding that plat restrictions are rights enforceable in equity by abutting landowners, were fully recognized in Illinois law well before Ward filed his first lawsuit in 1890.¹⁷⁹

Nevertheless, the particular dedication reflected in the notations on various maps of fractional sections 10 and 15 raised a number of unanswered questions. Would the restriction on buildings be subject to modification by future legislation? Or would it be regarded as a vested right impervious to legislative revision? If the restriction were to be regarded as a vested right, could it nevertheless be condemned in an action in eminent domain, and eliminated by paying just compensation to those who had relied upon it?

Another set of questions: Would traditional equitable doctrines such as the need to show irreparable harm stand as potential barriers to the issuance of an injunction enforcing the dedication? Would defenses such as laches, waiver, abandonment, or adverse possession be available if enforcement were sought after buildings were constructed?

square. *Id.* at 545. In effect, the interest of abutting owners in preserving the square as a park was regarded as a vested right, and as such was immune from legislative abrogation. *Id.*

¹⁷⁵ See, e.g., *id.* at 544; *Bd. of Trs. of the Ill. & Mich. Canal v. Haven*, 11 Ill. 554 (1850).

¹⁷⁶ See JOHN LEYBOURN GODDARD & EDMUND H. BENNETT, A TREATISE ON THE LAW OF EASEMENTS 181–82 (Boston, Houghton, Mifflin & Co. 1880); JONES, *supra* note 170, at 332–67.

¹⁷⁷ *Godfrey v. City of Alton*, 12 Ill. 29 (1850); see also *Canal Trustees*, 11 Ill. at 555–57 (relying on doctrine in determining the scope of private riparian rights in order to assess an award of damages for a stream diversion).

¹⁷⁸ See, e.g., *City of Alton v. Ill. Transp. Co.*, 12 Ill. 38 (1850); *Marcy v. Taylor*, 19 Ill. 634 (1858); *Waugh v. Leech*, 28 Ill. 488 (1862).

¹⁷⁹ See, e.g., *Maywood Co. v. Vill. of Maywood*, 118 Ill. 61, 69, 71, 73, 6 N.E. 866, 869, 870–71 (1886) (enjoining actions that would result in the transfer of a dedicated public park to private parties); *Vill. of Princeville v. Auten*, 77 Ill. 325 (1875) (barring the village from moving the village hall onto the public square); *City of Jacksonville*, 67 Ill. at 545 (barring construction of railroad in dedicated public square).

A third set of questions: Who, in addition to the public body that accepted the dedication (here the City, it was eventually held) and abutting owners, could enforce it? In particular, could the original grantors of the dedication—the Canal Commissioners and the United States—also enforce the dedication, like the settlor of a trust?

If abutting landowners could enforce the dedication, then a series of further questions would arise about who should be included in this class. Would this apply only to owners in fee simple of land abutting Michigan Avenue? What about purchasers on Randolph Street, to the north of the restricted area, or on Park Row, to the south? What about purchasers of land one block west, on Wabash Avenue, who could not claim a view of the lake but would benefit from lake breezes? Would tenants living in buildings on Michigan Avenue be allowed to enforce the dedication? Landlords holding only a reversion? Once condominiums were created, would each condo owner be entitled to enforce the dedication, or only the association as a whole, perhaps by majority vote?

If the restrictions were legally enforceable by individual landowners, then could the landowners agree to waive the restrictions, assuming of course that any other parties empowered to enforce (such as the City as trustee) also agreed to the waiver? How would such a waiver or consent be made? Would it be binding on successors in interest? Would one or more consents give rise to an estoppel barring a decision not to waive the restrictions in the future?¹⁸⁰

Still other questions related to the physical lay of the land. To begin: Did the statements on the maps have a different force with respect to property north of Madison Street as opposed to property south of Madison Street? To the north, the promise appeared on a map that was publicly recorded, and thus could be said to appear in the chain of title of all subsequent Michigan Avenue owners as well as whoever was determined to own Lake Park.¹⁸¹ To the south, the promise appeared on at least one unrecorded commercial map and was made in oral representations to purchasers.¹⁸² Arguably these more informal representations could not be invoked by successors in interest.

To continue: Did the restrictions apply only to the narrow strip of land shown on the original maps and plats, or would they also attach to enlargements of Lake Park (and later Grant Park) created by landfills? If the restrictions extended to artificial enlargements of the park, would this include only areas formally regarded as part of the park, or any contiguous landfilled area? What about structures erected on offshore islands?

¹⁸⁰ An analogy might be made to the rule in *Dumpro's Case*, which holds that once a landlord consents to assignment of a lease by a tenant, further assignments are presumed to have the landlord's consent. (1578) 76 Eng. Rep. 1110 (K.B.); 4 Co. Rep. 119 b.

¹⁸¹ See *supra* Part I.A.

¹⁸² See *supra* Part I.A.

Structures built north and south of the original boundary of the park? Underground structures?

A final set of questions related to the reference to “buildings” in the dedications: Did the dedications only prohibit buildings in a particular space? Or did the reference to “public ground” found on both the United States map of fractional section 10 and the commercial map of fractional section 15, together with the ordinances of the 1840s in which the City accepted the dedication and denominated the area a “park,” give rise to an inference that the space was dedicated *as a park*? Did this in turn mean that the only uses permitted in this space were ones consistent with park purposes? And, ultimately, a seemingly prosaic question: What is a building? Does a building refer only to an enclosed structure, and thus exclude things such as fences, bridges, and baseball stadiums?¹⁸³ Does a structure have to reach a certain size to be considered a building, thereby excluding small structures such as restrooms or storm shelters? Does a building refer only to a permanent structure, thereby excluding temporary enclosures such as tents?

One overarching issue presented by several of these questions is whether the restriction should be interpreted according to its ordinary or plain meaning, or instead in such a way as to effectuate its purpose. If purposive interpretation is appropriate, then it is necessary to identify the relevant purpose. Was the purpose of the restriction to preserve an open view and direct breezes from Lake Michigan? Or was it to preserve the market value of the Michigan Avenue property purchased in reliance on the restrictions? Was it to preserve the area as a public park? By way of illustration, consider a proposal to erect a baseball stadium in the space, consisting of a low fence and an open seating area. This might not qualify as a “building” under the ordinary meaning of the term. It also might not impair the view of the lake or the flow of air and light from the lake toward the properties on Michigan Avenue. But the crowds and noise that the stadium would attract might well impair the market value of the property of Michigan Avenue owners. And if it was a commercial enterprise, the baseball stadium might be deemed incompatible with the idea of a public park.

It would take many years, and many legal decisions, to answer the questions posed by the 1836 and 1839 restrictions. Some remain unresolved to this day.

III. PUBLIC DEDICATION ON THE LAKEFRONT BEFORE WARD

Someone familiar only with the *Ward* cases might assume that they were the first invocation of the public dedication theory on the Chicago lakefront. This would be mistaken. The public dedication theory was in

¹⁸³ See *infra* Part V.B.

fact advanced with some regularity by Michigan Avenue property owners well before Ward came on the scene. To be sure, none of the pre-*Ward* cases generated an appellate opinion.¹⁸⁴ But on the whole, these efforts were successful—enough so that one can say the public dedication theory was recognized not only in general jurisprudence but also as part of the local law of the Chicago lakefront.

The first known effort to enlist the aid of the courts in prohibiting the construction of a building in Lake Park occurred in 1864. The occasion was the Democratic National Convention scheduled to be held in Chicago that summer.¹⁸⁵ The convention obtained the City's permission to construct a "wigwam"—a circular wooden amphitheater with a canvas roof—at the southern end of the park at 11th and Michigan.¹⁸⁶ Michigan Avenue property owners objected to the plan, arguing in state court that it violated the promise to keep Lake Park free of buildings.¹⁸⁷ Their petition in equity stated that all of the land east of Michigan Avenue between Randolph Street on the north and Park Row on the south "is, and of right ought to be, kept open and vacant land."¹⁸⁸ Tracking the language of the 1861 and 1863 city charters, the petition claimed that no person or corporation was permitted to encroach on the land absent the assent of all abutting property owners.¹⁸⁹ Judge Wilson immediately granted the requested injunction.¹⁹⁰

The suit was perceived as being politically motivated, and a public outcry ensued.¹⁹¹ On June 2, 1864, the parties filed a detailed stipulation to remove the injunction and permit the construction of the wigwam to go forward, subject to a number of conditions, including a promise that the building would be torn down within six days of the end of the convention.¹⁹²

¹⁸⁴ Before 1887, a party could not appeal an interlocutory order granting or denying an injunction. See *Gage v. Eich*, 56 Ill. 297, 298 (1870) ("It is a well settled rule in equity practice, as well as in proceedings at common law, that no appeal lies from any interlocutory order merely, in either court. There must be a final decree, order or judgment, to justify an appeal."); SABIN D. PUTERBAUGH, PUTERBAUGH'S CHANCERY PLEADING AND PRACTICE 811 (6th ed. 1916). Thus, a party would have to incur the time and expense of litigating an action for injunction to a final judgment before taking an appeal. Since abutting property owners were generally successful in seeking temporary injunctions, they had no opportunity to appeal. Why the defendants in these actions did not appeal is not clear, but arguably they did not have a sufficiently strong stake in the matter to warrant the expense of an appeal until the fundamental question of title to Lake Park was resolved. In 1887, Illinois passed a law providing for appeals from interlocutory orders granting or enlarging the scope of injunctions, but not orders denying or dissolving them. 1887 Ill. Laws 250.

¹⁸⁵ See Cremin, *supra* note 26, at 59–62.

¹⁸⁶ *Id.* at 59–60.

¹⁸⁷ *The Copperhead Amphitheater*, CHI. TRIB., May 31, 1864, at 4; Cremin, *supra* note 26, at 60.

¹⁸⁸ *The Copperhead Amphitheater*, *supra* note 187.

¹⁸⁹ *Id.*

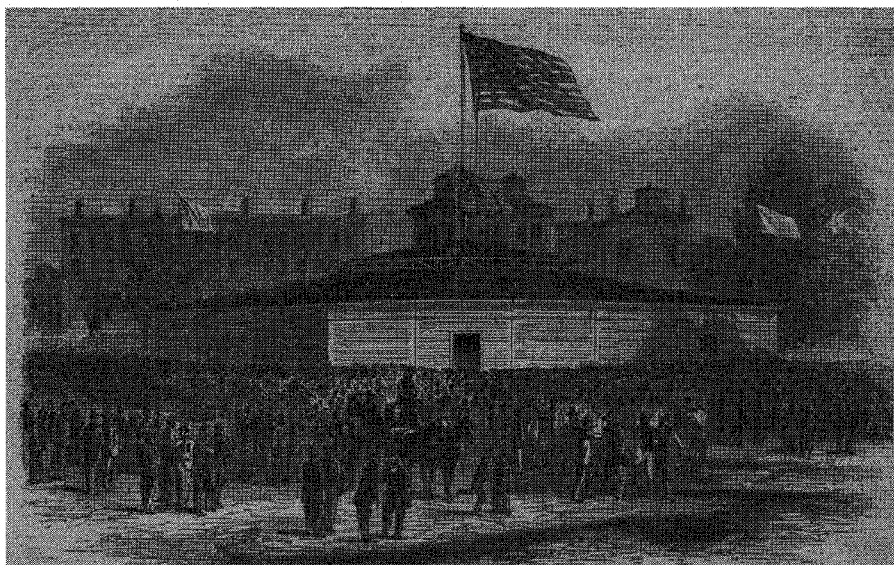
¹⁹⁰ *Id.*

¹⁹¹ See *Democratic Amphitheater*, CHI. TRIB., June 1, 1864, at 4.

¹⁹² *Copperhead Amphitheater*, CHI. TRIB., June 3, 1864, at 4.

Construction promptly resumed,¹⁹³ and the convention proceeded to nominate General George McClellan as the party's candidate in the general election. Consistently with the stipulation, the structure was removed in September 1864 after the convention.¹⁹⁴

FIGURE 10: WIGWAM IN LAKE PARK (AUG. 29, 1864)¹⁹⁵



The wigwam dispute, as the first legal action seeking to enforce the 1836 and 1839 map restrictions, was an important local precedent. Abutting landowners were granted an injunction enforcing the restriction against buildings, evidently on the understanding that this was necessary to protect their property rights. Public skepticism about the motives of the abutting owners was also a harbinger of the future. The settlement of the dispute—allowing the temporary erection of what was clearly a building—even more clearly established a pattern for the future.

A more consequential judicial precedent arose from the aftermath of the 1869 legislation known as the “Lake Front Steal.”¹⁹⁶ Recall that one of the elements of that act was a provision requiring the City to transfer title of north Lake Park to the Illinois Central Railroad for the construction of a new passenger depot.¹⁹⁷ This provision was widely opposed in Chicago,

¹⁹³ *That Amphitheater*, CHI. TRIB., June 6, 1864, at 4.

¹⁹⁴ Cremin, *supra* note 26, at 62.

¹⁹⁵ On file with Chicago History Museum ICHI-62405.

¹⁹⁶ See *supra* notes 52–56 and accompanying text.

¹⁹⁷ See *supra* note 53 and accompanying text.

primarily on the ground that the \$800,000 to be paid by the railroad for the land was inadequate.¹⁹⁸

Given that the objective of the grant was the erection of a building, it is not surprising that the first legal challenge to the Act was an action to enjoin construction as violating the restriction on buildings on the map of fractional section 10.¹⁹⁹ The identity of the complainant and the forum were, however, something of a surprise: the action was brought on behalf of the United States Government in federal circuit court by the local United States Attorney, J.O. Glover.²⁰⁰

A preliminary injunction was quickly granted, with U.S. Circuit Judge Thomas Drummond issuing a published opinion justifying his action.²⁰¹ Judge Drummond had no trouble concluding that the restriction against buildings was a binding commitment that could not be abrogated by “a simple stroke of legislation.”²⁰² Such a “special dedication” of property, he wrote, could only be extinguished through a proper exercise of the power of eminent domain.²⁰³ The Lake Front Act was not a valid exercise in eminent domain because the compensation was fixed by the legislature, not by a court, and was set at what was alleged to be an inadequate level.²⁰⁴ Moreover, the matter could not be vindicated by actions at law by affected owners because construction of the depot would cause irreparable injury to multiple persons.

The more difficult question, according to Judge Drummond, was whether the United States had authority to enforce the restriction on buildings. He concluded that the United States did have such authority, largely because the land marked “public ground” on the plat of fractional section 10 had never been sold, and hence, he assumed, was still owned by the United States.²⁰⁵ The United States was thus in the position of an owner who has restricted part of his land in order to encourage the sale of the remainder. In these circumstances, the federal government held the retained land as a “trustee” on behalf of those who had purchased, and had the right to invoke the power of a court of equity to enforce the restriction.²⁰⁶ In any

¹⁹⁸ See Kearney & Merrill, *supra* note 2, at 800–11.

¹⁹⁹ See *United States v. Ill. Cent. R.R.*, 26 F. Cas. 461, 461 (C.C.N.D. Ill. 1869).

²⁰⁰ *Id.*

²⁰¹ Drummond had been appointed a federal district judge in 1850 and then, after the Judiciary Act of 1869 created new circuit courts with appellate jurisdiction to review district court decisions, was appointed the first circuit judge in the region. Kevin Collins, *Drummond, Thomas*, in 1 *GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA* 212, 212–20 (John R. Vile ed., 2003). Drummond later rendered a second important decision involving public dedication on the lakefront. See *infra* note 219 and accompanying text. He retired in 1884. Collins, *supra*, at 219.

²⁰² *Ill. Cent. R.R.*, 26 F. Cas. at 463.

²⁰³ *Id.* at 462.

²⁰⁴ *Id.* at 464.

²⁰⁵ *Id.* at 462–63.

²⁰⁶ *Id.* at 464.

event, Judge Drummond concluded that a *private*-property owner abutting the park would have the right to seek an injunction. He observed that there was such an owner who also had sued and thus the order in which the suits were considered was immaterial.²⁰⁷ The injunction was not appealed by the Illinois Central,²⁰⁸ and had the effect of freezing plans to construct a new depot on the north Lake Park site (for all time, as things turned out).²⁰⁹

Shortly after the *Drummond* injunction was issued, much of Chicago, including Michigan Avenue properties, was consumed by the great fire.²¹⁰ As previously described, this event fundamentally transformed the lakefront.²¹¹ In the wake of the fire, a number of temporary buildings sprang up in Lake Park, most dramatically the enormous Inter-state Exposition Building constructed in 1873. The trauma of the fire also suppressed litigation over the construction of structures in the park. Gradually, the Exposition Building was joined by armories, baseball stadiums, depots operated by other railroad companies, various work sheds and loading docks, and a temporary post office.²¹²

Chicago was back on its feet again by the 1880s; the economy was booming, and Michigan Avenue property owners began to rediscover their distaste for encumbrances in the park. Litigation over the restriction against buildings erupted again in 1882. The principal properties that were involved in lawsuits during the ensuing years are shown in Figure 11. The catalyst for the first action was a decision by the City to permit the Baltimore & Ohio (B&O) Railroad to construct a passenger depot in the park.²¹³

²⁰⁷ That suit was filed by Ralph E. Starkweather. *Starkweather v. Ill. Cent. R.R.*, No. 8976 (C.C.N.D. Ill. Aug. 19, 1869), discussed in Chicago Public Library Archives: Property Records Dearborn Park Property 1935–1898 Box 1, *supra* note 86, at 208; see Transcript of Record, *supra* note 4, at 281. Two suits were also filed in state court seeking to enjoin construction of the depot. One was filed by Cyrus McCormick, the reaper manufacturer, and was later dismissed. *McCormick v. Ill. Cent. R.R.*, No. 31566 (Cook County, Ill., Cir. Ct. June 22, 1869), discussed in Chicago Public Library Archives: Property Records Dearborn Park Property 1935–1898 Box 1, *supra* note 86, at 209. Three years later, a fourth suit was filed by Mathew Laflin, also in state court; it, too, was dismissed. *Laflin v. City of Chicago*, No. 3066 (Cook County, Ill., Cir. Ct. June 29, 1872), discussed in Chicago Public Library Archives: Property Records Dearborn Park Property 1935–1898 Box 1, *supra* note 86, at 210.

²⁰⁸ According to newspaper accounts written later, the case proceeded to a full trial in July 1871, with Drummond granting a permanent injunction. See *The Lake-Front: John F. Stafford Wants It Denuded of Buildings*, CHI. TRIB., Oct. 11, 1882, at 8; *A Bill Filed To Keep the "Nickel-Plate" off the Lake-Front*, CHI. TRIB., Oct. 24, 1882, at 3. The permanent-injunction opinion and other papers were evidently destroyed in the Chicago Fire three months later; in any event, we were unable to find them.

²⁰⁹ It is not known why the Illinois Central did not appeal. One possible reason is that the railroad sought to get the Illinois legislature to abrogate the dedication. See *Kearney & Merrill*, *supra* note 2, at 898. Any appeal at that time would have been to the U.S. Supreme Court. See U.S. REV. STAT. §§ 563, 629 (1878).

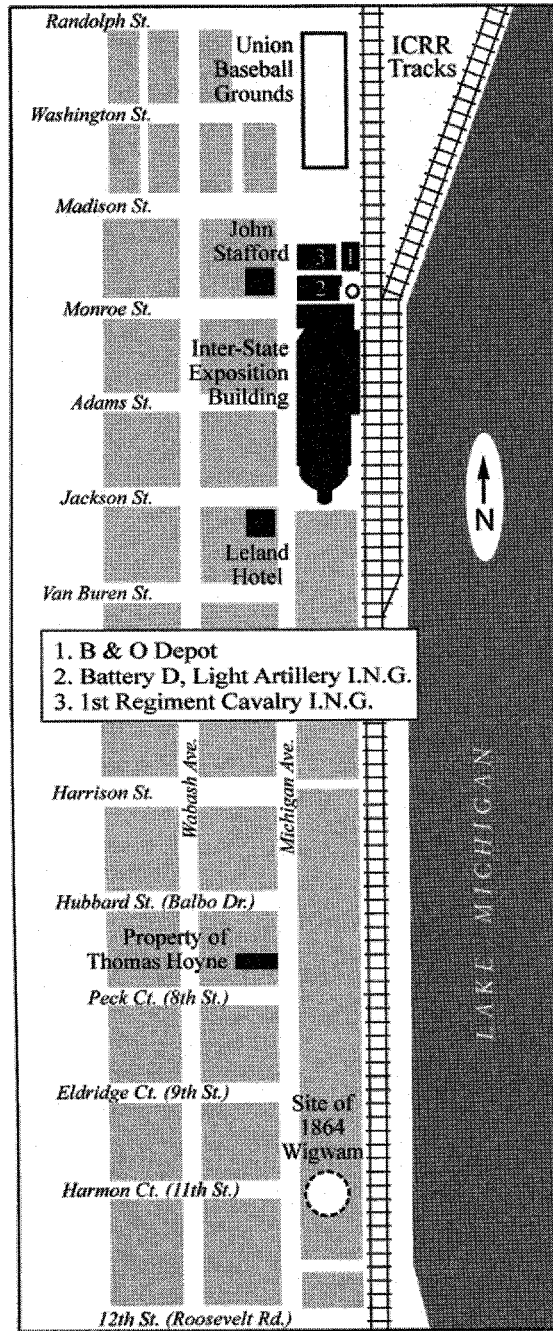
²¹⁰ See KOGAN & CROMIE, *supra* note 38.

²¹¹ See *supra* notes 57–67 and accompanying text.

²¹² See Cremin, *supra* note 26, at 90–128.

²¹³ See Bill of Complaint, *supra* note 72.

FIGURE 11: CERTAIN MICHIGAN AVENUE AND LAKE PARK PROPERTIES CIRCA 1882



The B&O had a thriving business in Chicago, transporting to the Midwest immigrants who had arrived from Germany and other European countries on the company's ships.²¹⁴ The B&O used the Illinois Central tracks but had not been able to arrange with the Illinois Central for depot space, presumably because of the Illinois Central's own challenges in that regard.²¹⁵ Instead, it had been using a space in the Inter-state Exposition Building.²¹⁶ It seemed only logical to allow it to build a freestanding depot just north of the Exposition Building.

Once construction of the new depot was underway, however, it was challenged in federal court by two Michigan Avenue property owners, John Stafford and Thomas Hoyne, joined by the State of Illinois.²¹⁷ The essential allegations included the standard elements of the public dedication theory. Not surprisingly, given the extensive construction activity in the park since the fire, the B&O's answer emphasized themes of waiver or abandonment. The railroad averred that the City had permitted various buildings to be constructed in the previous decade, that its proposed building could scarcely be seen from Michigan Avenue because of the other construction, and that the character of the west side of Michigan Avenue had changed permanently after (and because of) the fire.²¹⁸

The matter, like the 1869 litigation over the transfer of north Lake Park to the Illinois Central, was assigned to Judge Drummond. This time, however, the estimable judge refused to issue the requested injunction.²¹⁹ He noted that the State and the United States had originally intended the area to remain free of buildings, and he agreed that the Exposition Building, the armories, and the railroad structures were all built in violation of the trust in which the land was held. Nevertheless, with each new building, the State and the adjoining landowners gradually lost their right to enforce the dedication. In essence, because the plaintiffs had not objected to any of these buildings, they were estopped from now challenging the B&O terminal.²²⁰

The following year, 1883, was a banner year for litigation concerning the Chicago lakefront. In an effort to resolve the vexing question of title to Lake Park, the Attorney General of Illinois filed suit in Cook County

²¹⁴ 2 EDWARD HUNGERFORD, *THE STORY OF THE BALTIMORE & OHIO RAILROAD 1827-1927*, at 180-98 (1928).

²¹⁵ See *supra* notes 197-209 and accompanying text.

²¹⁶ See Cremin, *supra* note 26, at 101.

²¹⁷ Stafford owned half of a lot on Michigan Avenue on the block between Madison and Monroe. Thomas Hoyne owned a lot on Michigan Avenue well south of the proposed depot. See Bill of Complaint, *supra* note 72, at 9; *supra* Figure 11.

²¹⁸ Answer at 8-16, *Illinois v. Balt. & Ohio R.R.* (C.C.N.D. Ill. Nov. 3, 1882).

²¹⁹ *The Lake-Front: Judge Drummond Decides a Point in Favor of the Railroads*, CHI. TRIB., Nov. 8, 1882, at 12.

²²⁰ See *id.*

Circuit Court against the Illinois Central, the City of Chicago, and the United States, asserting ownership in the State.²²¹ After removing the case to federal court, the Illinois Central answered and filed cross-claims against the other parties, asserting alternatively that either the City or the railroad owned the park.²²² The United States filed its own complaint against the Illinois Central and affiliated railroads, as well as the City, asserting ownership in the United States.²²³ These actions were consolidated together before Justice John Marshall Harlan, sitting as circuit justice.²²⁴

That same year, Stafford filed suit in state court, mounting essentially the same challenge to buildings in Lake Park that he had unsuccessfully pursued in federal court the year before.²²⁵ Stafford brought the action on behalf of himself and all similarly situated property owners—essentially as a class action.²²⁶ It named as defendants not only the railroads, but also all other entities involved in building in the park, including the City.²²⁷

The forty-one-page complaint recounted at length the origins of Lake Park, which were said to establish a dedication to public uses free of buildings.²²⁸ It complained that the City, in violation of this public dedication, had permitted the construction of the Inter-state Exposition Building, a building occupied by Battery D of the First Artillery Illinois National Guard, the armory of the First Regiment of Cavalry of the Illinois National Guard, and the B&O depot.²²⁹ It also complained—for what would appear to be the event that precipitated the litigation—that the City had recently authorized a structure to be erected by the Trades Assembly and Knights of Labor, which was projected to be two stories tall and of sufficient dimensions to “contain one main hall and gallery and two ticket offices and a place for the sale of spirituous liquors, and all the other accessories of a play house or public hall and saloon.”²³⁰ Anticipating the likely defense, Stafford’s complaint averred that the abutting property owners had never consented to any encroachments on the lands so dedicated.²³¹ The relief sought was an injunction against further

²²¹ *Illinois v. Ill. Cent. R.R.*, 33 F. 730, 732 (C.C.N.D. Ill. 1888).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Bill of Complaint, *Stafford v. City of Chicago*, No. 83C44290 (Cook County, Ill., Cir. Ct. Mar. 23, 1883).

²²⁶ *Id.* at 1.

²²⁷ *Id.*

²²⁸ *Id.* at 1–12.

²²⁹ *Id.* at 14–26.

²³⁰ *Id.* at 13–14.

²³¹ *Id.* at 26–27, 32.

construction in the park and a cessation of essentially all development there.²³²

On May 9, 1883, Judge Moran granted a temporary injunction against further construction.²³³ According to a report of the decision in *Chicago Legal News*, the judge found the question whether the map restrictions could be enforced in equity "had been entirely settled by the [Illinois] Supreme Court."²³⁴ Pending a final decree, the buildings already constructed could stay.²³⁵ "But there must be no further encroachments."²³⁶

Judge Moran's injunction had the effect of freezing further construction in Lake Park. The portion of the park on the east side of Michigan Avenue, at least from the Exposition Building north to Randolph Street, was by then littered with a ragtag collection of structures, nearly all of which had been erected on a "temporary" basis. These could stay for the time being. But no further construction would be permitted.

The next move was launched by the United States Attorney and directed specifically at Albert Spalding's baseball stadium (Figure 12).²³⁷ On May 27, 1884, the United States sued the City and the Chicago Base Ball Club, Inc., complaining of the baseball grounds east of Michigan Avenue.²³⁸ The United States again alleged that it retained title to the land in fractional section 10.²³⁹ While Chicago was in possession of this land (as "mere custodian"), the federal government had dedicated the property and held it in trust for neighboring property owners and Chicago residents.²⁴⁰ The complaint alleged that the City had violated this trust by permitting Spalding to construct "a board fence at least ten feet in height, in such manner as to completely shut out said ground from public view or access, and . . . buildings for offices and also a building for a Grand stand," with "a roof and . . . seats."²⁴¹ The complaint noted that the public was excluded from the stadium unless it paid admission.²⁴²

²³² *Id.* at 36-39. At oral argument on the temporary injunction, Judge Moran remarked that the "only doubt" that he had about the case was whether Stafford and the others had standing or whether the State needed to be involved. *The Lake-Front Case Taken Under Advisement by Judge Moran*, CHI. TRIB., Apr. 25, 1883, at 6.

²³³ See *The Lake Front: A Temporary Injunction Granted Restraining the Erection of Any More Buildings on the Lake Park*, 15 CHI. L. NEWS 290 (1883).

²³⁴ *Id.* In particular, the judge regarded *City of Jacksonville v. Jacksonville Railway Co.*, 67 Ill. 540 (1873), as "directly in point." *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Bill of Complaint, *supra* note 70, at 6.

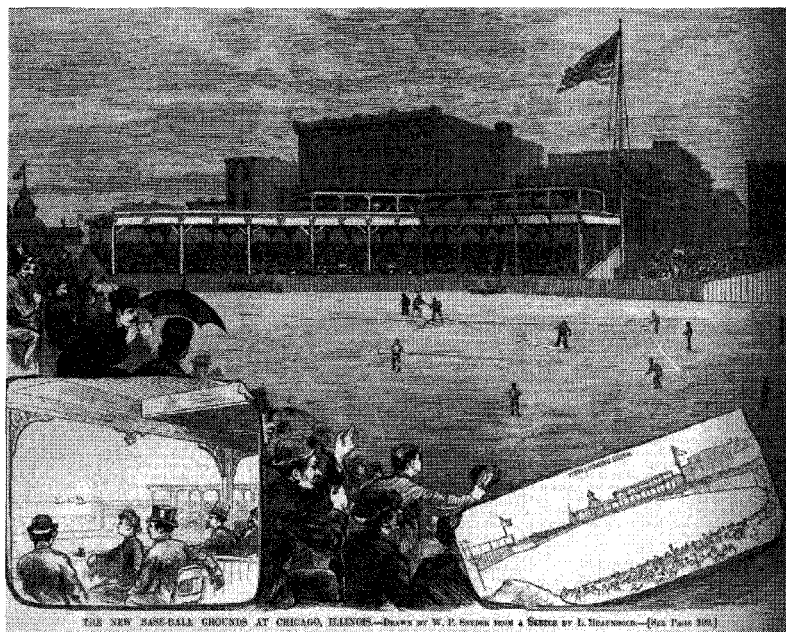
²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 8.

²⁴² *Id.* at 9.

FIGURE 12: UNION BASE-BALL GROUNDS 1883²⁴³

The government stated that “this bill is filed at the request and partly on the behalf of” neighboring owners and other Chicago residents.²⁴⁴ Indeed, though signed by U.S. Attorney Richard S. Tuthill,²⁴⁵ the complaint was verified by none other than John F. Stafford.²⁴⁶

Despite Spalding’s entreaties that the requested injunction could force the team to disband because it had no other suitable venue available, the government prevailed.²⁴⁷ On July 17, 1884, federal Circuit Court Judge Henry Blodgett ordered that the City “absolutely desist and refrain from leasing the whole or any part of the public ground” or from “constructing on or occupying the whole or any part of [it].”²⁴⁸ After the season was over, the ballclub was to cease playing on the grounds and remove its

²⁴³ *The Chicago Base-Ball Grounds*, HARPER’S WKLY., May 12, 1883, at 292.

²⁴⁴ Bill of Complaint, *supra* note 70, at 9.

²⁴⁵ Later, after his appointment to the Cook County Circuit Court bench, Tuthill heard the initial Daggett–Art Institute case and dissented from the full panel decision against Daggett. See *infra* notes 323–29 and accompanying text.

²⁴⁶ Bill of Complaint, *supra* note 70, at 13. For Stafford’s other involvement in lakefront litigation, see *supra* notes 217–20, 225–36 and accompanying text.

²⁴⁷ *The Lake-Front: No More Trespassers Allowed To Occupy the Ground*, CHI. TRIB., July 18, 1884, at 8.

²⁴⁸ *Id.*

structures.²⁴⁹ For the first time, a court ordered the actual demolition of a standing structure.²⁵⁰

The *Base Ball Club* litigation is also interesting because it reveals that there was considerable confusion, at least on the part of some influential actors, about the exact nature of the public dedication. At one point, Marshall Field and others felt compelled to go to Judge Blodgett for a modification of the injunction to permit the lakefront to be used as a place where snow removed from the front of businesses could be dumped.²⁵¹ Field and his compatriots evidently understood the dedication to be not just a negative restriction on buildings, but also an affirmative mandate to use the lakefront for park purposes. If the dedication was only a negative restriction on buildings, no serious argument could be made that it would bar dumping snow. But if the dedication was to use the space as a park, then dumping snow would be arguably improper.

In any event, the doubts expressed by Judge Drummond in 1869 about whether the United States had standing to enforce the public dedication were soon powerfully reinforced. In 1888, Justice Harlan, sitting as circuit justice, issued a comprehensive opinion resolving all the title issues raised by Illinois's 1883 lawsuit.²⁵² The State was given title to the submerged lands, the City was given title to Lake Park, and the railroad was allowed to keep all of its existing tracks, facilities, piers, and wharves, largely as an incident to its riparian rights north of Randolph Street and south of 12th Street.²⁵³

With respect to the matter most relevant to the public dedication issue, however, Justice Harlan held that the United States did not have standing to object to the construction of buildings in Lake Park.²⁵⁴ Justice Harlan concluded that the public recording of the plat of the Fort Dearborn Addition in 1839 constituted an offer to make a statutory dedication of the open space marked on the plat, and this had been accepted by the City of Chicago when the City adopted its ordinances declaring the space a public park.²⁵⁵ The statutory dedication transferred the title of the open space to the City. In effect, the United States had given away any remaining interest in the property and thus did not have standing to enforce the plat

²⁴⁹ *Id.*

²⁵⁰ So-called "mandatory injunctions"—those requiring positive action on the part of the defendant—were rarely granted in federal court. See 3 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE § 2289 (1909) ("A mandatory injunction is never granted unless very serious damage will ensue from withholding relief . . .").

²⁵¹ See Motion to the Honorable Henry W. Blodgett at 1, *United States v. Chi. Base Ball Club*, No. 19026 (C.C.N.D. Ill. May 27, 1884) (undated motion signed by Marshall Field and others, requesting that George Wells be allowed to dump snow on the lakefront).

²⁵² *Illinois v. Ill. Cent. R.R.*, 33 F. 730 (C.C.N.D. Ill. 1888).

²⁵³ *Id.* at 756–59.

²⁵⁴ *Id.* at 753–55.

²⁵⁵ *Id.*

dedication.²⁵⁶ This ruling would be affirmed by the Supreme Court a number of years later.²⁵⁷

The practical effect of Justice Harlan's decision, in terms of Lake Park, was that Michigan Avenue landowners could no longer count on accommodating U.S. Attorneys serving as their enforcement agents. One or more property owners themselves would have to step forward to assume this role. But Justice Harlan did not question the right of abutting landowners to enforce the dedication. Judge Moran's injunction against the construction of any new buildings, issued on behalf of John Stafford and other landowners, still stood. And there was evidence that the property owners would continue to assert their rights.

Meanwhile, a new plaintiff appeared on the scene: Warren F. Leland, owner of the Leland Hotel, located on the west side of Michigan Avenue between Jackson and Van Buren streets. In late 1886, Leland filed suit in Cook County Circuit Court against the City and one John M. Martin, seeking an injunction against a toboggan slide that the City had permitted Martin to erect in Lake Park south of the Exposition Building.²⁵⁸ Martin said that the toboggan slide was intended to raise funds to support an impoverished widow, Mrs. Carpenter.²⁵⁹ He further claimed to have obtained the consent of property owners on Michigan Avenue.²⁶⁰ But Leland refused to consent; he alleged that the toboggan slide would damage his hotel business. Judge Louis Collins issued a temporary injunction in late December and a permanent injunction early the next year.²⁶¹

In 1889, Leland was back in state court again, this time challenging a proposal to modernize the Exposition Building by adding a powerhouse. Again, a temporary injunction was promptly issued.²⁶² The City disclaimed any interest in building a power plant on the lakefront, but nevertheless stated that it wanted to continue the lawsuit so that it could obtain a definitive declaration of the rights of the City in the park.²⁶³ It appears, however, that Leland made no effort to pursue a permanent injunction.

At this point, it is worth pausing to ask this question: What would a well-informed attorney have concluded in 1890, on the eve of the first *Ward* suit, about the status of the public dedication theory as applied to Lake

²⁵⁶ *Id.*

²⁵⁷ *United States v. Ill. Cent. R.R.*, 154 U.S. 225 (1894).

²⁵⁸ Bill of Complaint at 1, *Leland v. City of Chicago*, No. 86-G-59228 (Cook County, Ill., Cir. Ct. Dec. 29, 1886); *A Toboggan Slide*, CHI. TRIB., Dec. 30, 1886, at 12.

²⁵⁹ *A Toboggan Slide*, *supra* note 258.

²⁶⁰ *Id.*

²⁶¹ *Items*, CHI. TRIB., Feb. 15, 1887, at 6.

²⁶² *A Novel Suit*, DAILY INTER OCEAN (Chi.), Aug. 4, 1889, at 9.

²⁶³ *The Lake Front Trouble*, DAILY INTER OCEAN (Chi.), Nov. 1, 1889, at 3. Presumably this interest was stimulated by Justice Harlan's circuit court ruling in the first *Illinois Central* case that the City held the title to the land on the lakefront.

Park? There could be no doubt that under Illinois law the restrictions against buildings reflected in the 1836 maps of fractional section 15 and the 1839 map of fractional section 10 were legally enforceable. There could also be no doubt that owners of land abutting Michigan Avenue had standing to sue in equity to enforce the restrictions. On the other hand, there was uncertainty as to whether the dedication merely barred the construction of buildings, or whether it affirmatively mandated that the lakefront be used as a park. There was also some risk that abutting landowners would be denied relief on the ground that the restrictions had been abandoned or waived because of the flurry of construction activity in the park after the great fire in 1871. And it was increasingly likely that the United States would be denied standing to enforce the restrictions, and hence the U.S. Attorneys could no longer act on behalf of the property owners in federal court. On the whole, however, the prospect for success through litigation by Michigan Avenue owners was quite good—especially if they could find a champion willing to shoulder the cost.

IV. THE WATCHDOG OF THE LAKEFRONT

We now turn to an individual who was to have a profound impact on the future of the Chicago lakefront. Aaron Montgomery Ward's contribution did not take the form of a publicly articulated vision for the future of the park, as in the case of Daniel Burnham. Nor did it take the form of any legal innovation. The elements of the public dedication theory that Ward's lawyers would advance were all in place, and had been repeatedly asserted in the context of the Chicago lakefront before Ward came on the scene. Ward's contribution was to fund litigation on behalf of Michigan Avenue property owners at a level and with a degree of persistence that had not been previously seen and has not been witnessed since. Ward's deep pockets and his persistence—some would say stubbornness—transformed the local understanding of the public dedication doctrine into four Illinois Supreme Court decisions, the cumulative impact of which would serve for over a century to constrain local officials from constructing new buildings in Grant Park.

A. Aaron Montgomery Ward

Montgomery Ward has always been something of a mystery, especially with respect to his motives for waging a twenty-year campaign to keep Grant Park free of buildings. He has no full-length biography.²⁶⁴ He

²⁶⁴ The only published biography is NINA BROWN BAKER, *BIG CATALOGUE: THE LIFE OF AARON MONTGOMERY WARD* (1956), a children's book containing imaginary dialogue and no bibliography. The major reported events in the book, however, are consistent with company biographical sketches and other sources.

A document titled "Copy of a Memorandum Found among the Private Papers of Mr. A. Montgomery—in his own handwriting" briefly recounts the history of Ward's life. This document is

disliked publicity and rarely spoke to the press.²⁶⁵ He consistently refused permission to be written up in sketches of Chicago leaders.²⁶⁶ He reportedly gave generously to philanthropic causes during his lifetime, but nearly always anonymously.²⁶⁷ Allison Dunham, a longtime property professor at the University of Chicago Law School, once wrote: "Those who really want to know Mr. Ward's motives will have to await psychoanalysis of his letters and papers."²⁶⁸ Unfortunately, if Ward left any papers and letters, they long ago disappeared.²⁶⁹

The bare outline of what is known about Ward suggests that he was the quintessential self-made man.²⁷⁰ Ward was born on February 17, 1844, in Chatham, New Jersey.²⁷¹ Raised in poverty in Niles, Michigan, he left school at the age of fourteen to work as a manual laborer to help support his family.²⁷² Later, he became a shop clerk in St. Joseph, Michigan.²⁷³

available at the Chicago History Museum and the American Heritage Center at the University of Wyoming. It seems to be the foundation for most of the biographical sketches of Ward and is often cited as "Ward's diary." See, e.g., Daniel J. Boorstin, *A. Montgomery Ward's Mail-Order Business*, 2 CHI. HIST. 142, 145 (1973).

²⁶⁵ Robert J. Thorne, *Former Executives Tell of the "Old Days,"* FORWARD, Nov. 1925, at 4. Ward "had a strong aversion to being interviewed by the press, or having any court papers served upon him." *Id.* His second-floor office was difficult to access, being reached only by a winding iron staircase. *Id.* "When he was in the very public first floor offices, he usually left his hat on, making it seem to a stranger that he was a visitor." *Id.*

²⁶⁶ Allison Dunham, *The Chicago Lake Front and A. Montgomery Ward*, 1 LAND-USE CONTROLS 11, 19 (1967).

²⁶⁷ Ward's wife, Elizabeth, and daughter, Marjorie, made substantial charitable donations after his death, many of which bear the Ward name. Based on a donation of \$8 million, the principal classroom building at Northwestern University's medical school is still named after Mr. and Mrs. Ward. *History: 1900-1949 Timeline*, NW. U., <http://www.northwestern.edu/about/history/1900-1949.html> (last visited Aug. 18, 2011).

²⁶⁸ Dunham, *supra* note 266, at 20.

²⁶⁹ Such is the conclusion of both our own research and that of David Blanke. See DAVID BLANKE, *SOWING THE AMERICAN DREAM: HOW CONSUMER CULTURE TOOK ROOT IN THE RURAL MIDWEST* 273 n.10 (2000).

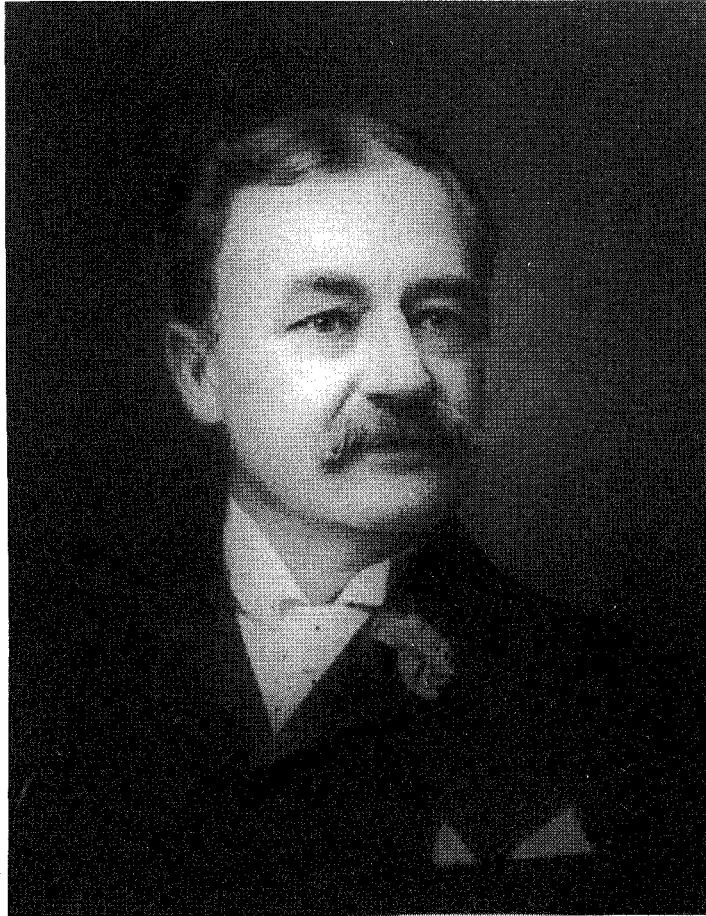
²⁷⁰ We rely primarily on two company-sponsored histories for biographical details: MONTGOMERY WARD & CO., *THE HISTORY AND PROGRESS OF MONTGOMERY WARD & COMPANY* (1925) [hereinafter *HISTORY & PROGRESS*] and FRANK B. LATHAM, 1872-1972, *A CENTURY OF SERVING CONSUMERS: THE STORY OF MONTGOMERY WARD* (1972).

²⁷¹ *HISTORY & PROGRESS*, *supra* note 270, at 5.

²⁷² *Id.* at 6.

²⁷³ *Id.*

FIGURE 13: PORTRAIT OF AARON MONTGOMERY WARD²⁷⁴



After the Civil War ended in 1866, Ward moved to Chicago, the new center of the Midwest, where he worked as a clerk at Field, Palmer & Leiter, which later became Marshall Field & Co.²⁷⁵ Ward then became a traveling salesman for a St. Louis wholesale house, which served as a supplier to rural general stores.²⁷⁶ During his travels throughout the rural Midwest, he observed the often-shoddy goods sold at high prices to farm families in small-town stores.²⁷⁷ He later switched jobs again, becoming a buyer for C. W. & E. Pardridge Co., a Chicago dry-goods company.²⁷⁸

²⁷⁴ On file with Chicago History Museum ICHi-62410.

²⁷⁵ LATHAM, *supra* note 270, at 2-3.

²⁷⁶ *Id.* at 3.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 4.

Armed with close familiarity with rural tastes and values and a background in both sales and purchasing, Ward conceived a revolutionary scheme to buy goods in bulk and sell them directly to farmers through the U.S. mails.²⁷⁹ In early 1871, Ward had saved enough money to buy a small amount of goods, but before he could advertise to customers, his inventory was completely destroyed by the Chicago Fire.²⁸⁰ He was determined to start over, and in August 1872 he had again saved enough money to build a small inventory.²⁸¹ His first catalog was a single page.²⁸² The first year was a slow one, exacerbated by the Panic of 1873, and Ward kept his day job at Partridge's while he filled orders at night from items that he bought from surplus Partridge's stock.²⁸³

The missing ingredient was credibility with rural customers, who needed to be convinced that they would not be cheated if they sent cash to a firm in Chicago.²⁸⁴ Ward solved the problem by forging an alliance with the populist Granger movement, securing the right to use Granger membership lists and to call his operation the "Original Grange Supply House."²⁸⁵ He also conceived the radical idea of offering a money-back guarantee on all goods sold, no questions asked.²⁸⁶

The result was phenomenal. By cutting out the middlemen, emphasizing value, and working tirelessly to determine what his customers wanted, Ward's company quickly became the largest retailer in America.²⁸⁷ Ward's concept was copied by Sears, Roebuck & Co., which would eventually overcome Ward's after fierce competition.²⁸⁸ But it is no exaggeration to say that Montgomery Ward was to the late nineteenth century what Sam Walton and Walmart were to the late twentieth. Starting with a focus on rural and small-town America, Ward, like Walton, revolutionized merchandizing.²⁸⁹ Also like Walton, Ward encountered

²⁷⁹ Boorstin, *supra* note 264, at 144–45.

²⁸⁰ LATHAM, *supra* note 270, at 5–6.

²⁸¹ *Id.* at 6.

²⁸² CECIL C. HOGE, SR., *THE FIRST HUNDRED YEARS ARE THE TOUGHEST: WHAT WE CAN LEARN FROM THE CENTURY OF COMPETITION BETWEEN SEARS AND WARDS* 12 (1988).

²⁸³ LATHAM, *supra* note 270, at 8–9.

²⁸⁴ In November 1873, the *Chicago Tribune* advised its readers not to trust a company calling itself Montgomery Ward & Co., which the paper characterized as a "swindling" operation run by "dead-beats." *Grangers, Beware!*, CHI. TRIB., Nov. 8, 1873, at 3. Ward immediately called for a retraction, and the newspaper sent a reporter to investigate Ward's operations. The reporter was so impressed that the newspaper printed a full retraction, including a glowing review of the company. *Montgomery, Ward & Co.*, CHI. TRIB., Dec. 24, 1873, at 5. Ward reprinted the entire article in his 1874 catalog. LATHAM, *supra* note 270, at 9–10.

²⁸⁵ HOGE, *supra* note 282, at 13 (internal quotation marks omitted).

²⁸⁶ LATHAM, *supra* note 270, at 12.

²⁸⁷ HOGE, *supra* note 282, at 23.

²⁸⁸ *Id.* at 36–40.

²⁸⁹ See DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 121–29 (1973); see also Boorstin, *supra* note 264, at 142–52.

fierce resistance from local retailers, some of whom organized collective burnings of Ward's catalogs to protest his enterprise.²⁹⁰

Ward's first Granger catalog was mailed in 1872. Within a few years, he and his partner, George Thorne,²⁹¹ were scrambling to acquire ever-bigger office and warehouse space in Chicago, first on Clark Street, then Michigan Avenue, then Kinzie Street, and then Wabash Avenue.²⁹² In 1887, Ward and Thorne purchased two adjacent lots on the west side of Michigan Avenue, between Madison and Washington streets, for \$235,000.²⁹³ Two years later, they acquired the lot to the south for \$72,000.²⁹⁴ By 1890, they had constructed a seven-story "skyscraper," celebrated for its six steam elevators (see Figure 14).

Ward and Thorne later stated that they selected the site on Michigan Avenue in order to assure that their employees enjoyed sunlight, fresh air, and a relatively quiet location in which to work.²⁹⁵ This claim is plausible. Ward was by all accounts highly solicitous of his employees' well-being: he offered group health insurance to employees well before it was typical to do so, enabled female workers to dry their shoes and stockings on rainy days, and offered free malted milks midmorning and midafternoon in the belief that this would fortify at-risk employees against tuberculosis.²⁹⁶ The lakefront site was not chosen to appeal to customers, since the catalog facility was not, at least initially, open to the public. Later, during the Columbian Exposition, Ward added a plush "Customers' Parlor" on the first floor, where visitors could browse through catalogs and place orders, or simply rest their feet.²⁹⁷ But when the Michigan Avenue facility was

²⁹⁰ BOOTON HERNDON, SATISFACTION GUARANTEED: AN UNCONVENTIONAL REPORT TO TODAY'S CONSUMERS 168 (1972). Some local groups offered a small reward for customers who threw their catalogs in the fire. Many of these customers would earn the reward and simply send off for another catalog. *Id.*

²⁹¹ George Thorne was not very involved in the lakefront fight. At the time of the disputes, Ward was the owner of the Michigan Avenue properties. See Letter from George P. Merrick to John G. Carlisle, Sec'y of Treasury (June 20, 1895) (on file with the National Archives at College Park, Maryland). In addition, Thorne may not have been as active as Ward in the lakefront fight because he may have had a different view of how the Chicago lakefront should look. It is possible that he shared the views of his son, Charles Thorne, who was a member of the Commercial Club of Chicago and was involved with the development of the Burnham Plan.

²⁹² HISTORY & PROGRESS, *supra* note 270, at 11, 14, 17.

²⁹³ Transcript of Record, *supra* note 4, at 312 (statement of A. Montgomery Ward and George R. Thorne); LATHAM, *supra* note 270, at 29.

²⁹⁴ Transcript of Record, *supra* note 4, at 312 (statement of A. Montgomery Ward and George R. Thorne); LATHAM, *supra* note 270, at 30.

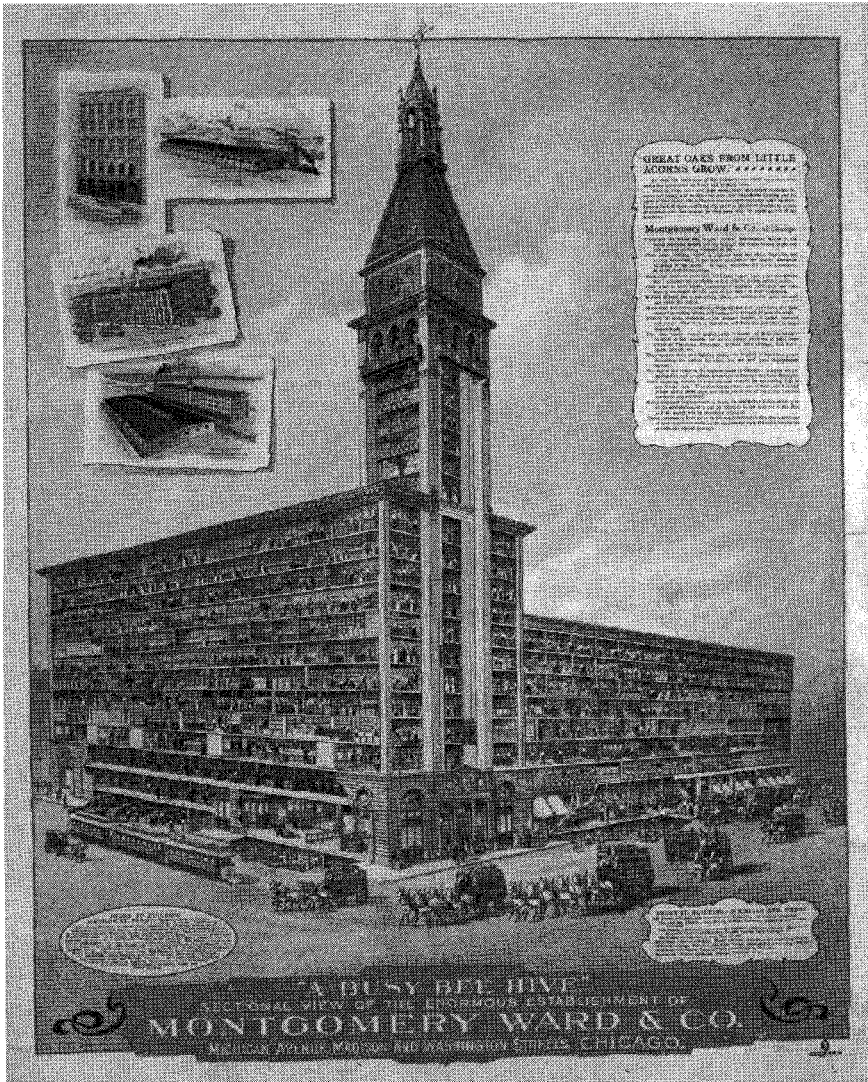
²⁹⁵ Transcript of Record, *supra* note 4, at 312-15 (statement of A. Montgomery Ward and George R. Thorne). Ward also cited the lack of soot and dust from nearby chimneys and a lower fire-insurance rate as additional advantages of the lakefront location. *Id.* at 315.

²⁹⁶ See HERNDON, *supra* note 290, at 169.

²⁹⁷ WILLE, *supra* note 4, at 73.

established, Ward, Thorne, and their employees were the only people who would be affected by the light, air, and views that the lake afforded.

FIGURE 14: CATALOG COVER SHOWING THE ACTIVITY IN WARD'S WAREHOUSE AT THE CORNER OF MADISON STREET (LEFT-HAND SIDE) AND MICHIGAN AVENUE CIRCA 1900²⁹⁸



²⁹⁸ On file with Chicago History Museum ICHi-HB-29482.

B. The Local Litigation Phase—1890–1895

When Ward and Thorne purchased their property on Michigan Avenue in 1887, other landowners, including John Stafford, Warren Leland, and Sarah Daggett, were already active in threatening and sometimes actually suing for injunctions to stave off construction in the park.²⁹⁹ Once Ward and Thorne completed their new building in 1890, they quickly joined forces with this group. Ward was not immediately regarded as the leader. He gradually assumed this role, as Stafford leased his property for ninety-nine years beginning in 1888,³⁰⁰ Warren Leland sold his hotel and withdrew from his suit in 1892,³⁰¹ and Daggett died in 1895.³⁰²

During the first years of Ward and Thorne's ownership on Michigan Avenue, their legal activity remained focused on the local courts, which had been issuing injunctions enforcing the dedication off and on since 1864. The first recorded salvo from Ward & Co. came on October 16, 1890.³⁰³ The partners filed a complaint in the Superior Court of Cook County to enjoin the City of Chicago from erecting any buildings in Lake Park.³⁰⁴ The Illinois Central and other railroads were made parties to the suit.³⁰⁵ The genesis of the suit—according to later accounts—occurred when Ward looked out the window from his new office and saw workers building scaffolding to load garbage into railroad cars.³⁰⁶ He summoned his lawyer, George P. Merrick, and demanded that something be done to clean up the mess.³⁰⁷

²⁹⁹ See *supra* Part III.

³⁰⁰ Indenture Between John Francis Stafford and Andrew Jackson Cooper (Dec. 1, 1887) (on file with Cook County Recorder of Deeds Office, Doc. No. 1244031, recorded in book 2848 page 322).

³⁰¹ *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79, 82 (Cook County, Ill., Cir. Ct. 1892); *Warren F. Leland Dead*, N.Y. TIMES, Apr. 5, 1899, at 7.

³⁰² See *Will of Sarah E. Daggett*, CHI. TRIB., July 21, 1895, at 15.

³⁰³ *City of Chicago v. Ward*, 169 Ill. 392, 393, 48 N.E. 927, 927 (1897).

³⁰⁴ *Id.*

³⁰⁵ *Id.*, 48 N.E. at 928.

³⁰⁶ LATHAM, *supra* note 270, at 51; WILLE, *supra* note 4, at 71. We have uncovered no contemporary evidence to support this account of the suit's origins. The first version of the story that we found appears in Gene Morgan, *How Grant Park Was Saved for People; Ward's Great Fight Waged 21 Years*, CHI. DAILY NEWS, June 8, 1935, at 5.

³⁰⁷ Ward was represented throughout the litigation by two lawyers, Elbridge Hanecy and George Merrick. Hanecy grew up in Wisconsin and moved to Chicago in 1869 after graduating from the College of Milwaukee. His first job in Chicago was at Field, Leiter & Co., where he missed Ward by about two years. After being admitted to the Illinois bar in 1874, Hanecy practiced solo for several years until he took on Merrick, who became his partner in 1889. Hanecy was elected circuit judge for Cook County in 1893, where he remained until 1904. A.N. WATERMAN, 2 HISTORICAL REVIEW OF CHICAGO AND COOK COUNTY AND SELECTED BIOGRAPHY 660–62 (1908); *George Peck Merrick*, in 2 HISTORICAL ENCYCLOPEDIA OF ILLINOIS 547, 547 (Newton Bateman & Paul Selby eds., 1906). Hanecy served as Ward's lawyer until he took the bench, and he resumed his representation of Ward when he returned to the bar. Despite his previous service to Ward, Hanecy, while serving as a judge, presided over a case related to the lakefront. See *infra* note 568 and accompanying text.

The complaint offered a relatively straightforward rendition of the public dedication theory, aside from some hedging about which government entity had title to Lake Park—a matter still pending before the U.S. Supreme Court.³⁰⁸ Among other derelictions, the complaint emphasized, the City had allowed several railroads to build “cheap frame structure[s]” in the park, had “constructed or caused to be built certain scaffolding” upon which “filth, refuse, garbage, and rubbish from many streets and alleys of the City of Chicago has been placed,” and had “caused to be built a large one story structure . . . partially rotted or decayed” for storing paving blocks.³⁰⁹

The next day, the clerk of court issued a writ of injunction prohibiting any of the defendants “from erecting or causing to be erected . . . any structure [in the park].”³¹⁰ In essence, this merely replicated the injunction issued by Judge Moran, which was still in effect.³¹¹ The action thereafter lay dormant for several years.

Meanwhile, planning for the Columbian Exposition was underway. The sponsors ultimately decided that one building, the World’s Congress Auxiliary, would be located in Lake Park, in a new structure that would replace the decrepit Inter-state Exposition Building.³¹² After the fair, the new building would become a permanent memorial to the Exposition and a home for the Art Institute.³¹³ The directors of the Art Institute were well aware of the risk of litigation from Michigan Avenue owners. Consequently, Caryl Young, a Michigan Avenue property owner sympathetic to the project, sought to obtain consents to construction of the new structure from property owners abutting the park.³¹⁴ Consents were sought from those who owned property immediately across from the proposed structure and those owning lots immediately north and south of this area. Ward and Thorne’s property was one block north of this consent zone, so their consents were not sought.³¹⁵ Even within the two-block

Unlike Hanecy, Merrick was educated by private tutors and attended college at Northwestern University. ALBUM OF GENEALOGY AND BIOGRAPHY: COOK COUNTY, ILLINOIS 598–99 (3d ed. 1895). He served as a trustee for Northwestern for several years, and he had many prominent clients, including the Santa Fe Railroad. Despite his many achievements, Merrick’s work on the lakefront litigation was cited at his death as his greatest accomplishment. *George Merrick Dies; A Veteran Chicago Lawyer*, CHI. TRIB., Nov. 3, 1938, at 18.

³⁰⁸ Transcript of Record, *supra* note 4, at 5 (Bill of Complaint).

³⁰⁹ *Id.* at 8–11.

³¹⁰ *Id.* at 18.

³¹¹ See *City of Chicago v. Ward*, 169 Ill. 392, 392, 400, 48 N.E. 927, 928 (1897); Transcript of Record, *supra* note 4, at 17–19.

³¹² See *supra* notes 76–81 and accompanying text.

³¹³ See *supra* notes 78–79 and accompanying text.

³¹⁴ Affidavit of Caryl Young at 1, *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79 (Cook County, Ill., Cir. Ct. 1892) (No. 89C74794).

³¹⁵ Later authors have claimed, erroneously, that Ward and Thorne gave their consent to the Art Institute. See, e.g., Dunham, *supra* note 266, at 15. There is no documentary evidence supporting this claim, and it is inconsistent with the list of consenting owners in the *Daggett* case file.

stretch of land in which consents were sought, one owner, Sarah Daggett, held out.³¹⁶ While she was visiting family members in New York, Young approached her husband, Isaac Daggett, seeking his consent. Although Isaac had no ownership interest in the property and declined to sign the consent form, Young evidently came to believe that the Daggetts did not oppose the Art Institute construction, and reported this back to the directors.³¹⁷

Armed with what it apparently regarded as a complete set of owner consents, the Art Institute entered into construction contracts on February 4, 1892.³¹⁸ On February 6, Sarah Daggett wrote to one of the directors stating that she in fact did not consent to the construction of a new building.³¹⁹ Although that director informed his fellow directors of this communication, construction went ahead. Shortly thereafter, on April 3, the City was served with an order to show cause why it should not be held in contempt under the 1889 injunction obtained by Warren Leland.³²⁰ Leland had withdrawn as a plaintiff in that suit in 1892,³²¹ but had been replaced by none other than Sarah Daggett.³²²

³¹⁶ *Daggett*, 3 Ill. Cir. Ct. Rep. 79; see also *Gives Its Reasons*, CHI. TRIB., May 21, 1892, at 13. John Stafford also opposed the Art Institute, but he had entered into a ninety-nine-year lease of his property, which raised (legitimate) doubts about his standing to object or consent. *Alone in the Fight*, CHI. TRIB., June 2, 1892, at 16.

³¹⁷ The panel of circuit court judges reviewing the case determined that this consent was sufficient. *Daggett*, 3 Ill. Cir. Ct. Rep. at 86. The first *Ward* decision also later posited that this consent was likely sufficient. *City of Chicago v. Ward*, 169 Ill. 392, 420, 48 N.E. 927, 936 (1897). Newspaper accounts of the episode offer somewhat conflicting depictions of what happened. Compare *Four Judges Hearing It*, EVENING NEWS (Chi.), June 20, 1892, at 2, and *Courts of Record*, DAILY INTER OCEAN (Chi.), May 21, 1892, at 13, with *She Ignored Her Spouse*, CHI. DAILY NEWS, June 2, 1892, at 1. In the circuit court litigation, Caryl Young submitted an affidavit stating that he had visited Isaac Daggett, believing him to be the owner of the Michigan Avenue property, and that Isaac Daggett told him to return after he had received more consents. Later, while Daggett was in New York, Young sent him several newspaper clippings regarding the Art Institute. At no time, according to Young, did Daggett manifest any opposition to the Art Institute. Affidavit of Caryl Young, *supra* note 314, at 1–3. Isaac Daggett responded with an opposing affidavit stating that he had told Young that Sarah Daggett was the owner of the property, whereupon Young said he would return after receiving more signatures. Daggett, “not wishing to be considered rude or unfriendly . . . replied . . . that [Young] might call.” Affidavit of Isaac M. Daggett (May 2, 1892) at 2, *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79 (Cook County, Ill., Cir. Ct. 1892) (No. 89C74794). Daggett insisted, however, that he never did anything to suggest that either he or his wife supported the Art Institute; to the contrary, he had always opposed any building on the lakefront. *Id.* at 1–4.

³¹⁸ *Daggett*, 3 Ill. Cir. Ct. Rep. at 86.

³¹⁹ *Id.* Isaac Daggett sent a letter to Art Institute Director William M.R. French on February 1, 1892, stating that he and Sarah did not consent to the Institute. A copy of Director French’s reply of February 6, 1892, is found in the case record. Affidavit of Isaac M. Daggett (June 20, 1892), *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79 (Cook County, Ill., Cir. Ct. 1892) (No. 89C74794).

³²⁰ *Daggett*, 3 Ill. Cir. Ct. Rep. at 87; *Gives Its Reasons*, *supra* note 316, at 13.

³²¹ Leland had sold his hotel on Michigan Avenue and purchased another on the South Side. *Warren F. Leland Dead*, *supra* note 301.

³²² *Gives Its Reasons*, *supra* note 316.

Ruling on the motion, Judge Tuthill found that the 1889 Leland injunction applied to the Art Institute building, and construction activity was brought to a halt.³²³ In an unusual move designed to resolve the matter expeditiously, because the opening of the fair was rapidly approaching, the matter was then reheard three weeks later by a full panel of circuit court judges, which reversed Tuthill's ruling.³²⁴

The panel of circuit judges reaffirmed that the plat restrictions created an enforceable public dedication, and that Daggett, as an abutting owner, had standing to enforce the restrictions in equity.³²⁵ It gave three reasons why injunctive relief was nevertheless improper. First, the panel held that Daggett was guilty of laches for failing to assert her claim for injunctive relief before the Art Institute had expended considerable money (\$100,000 was mentioned) on construction activity.³²⁶ Given the dubious circumstances surrounding Daggett's alleged consent, and her prompt clarification that she had not given such consent just two days after the construction contracts were signed, this was a flimsy argument. Second, the state legislature had adopted legislation in 1890 authorizing the World's Fair to construct buildings in the park, and this legislation provided for condemning any rights of abutting property owners for a period of up to five years if necessary.³²⁷ Although no action to condemn the rights of abutting owners had been commenced, the court reasoned that this legislation in effect converted their interest into a right to obtain money compensation in exchange for their interest, and hence eliminated their right to specific relief in equity.³²⁸ Finally, the panel expressed skepticism about

³²³ See *Against the Art Institute*, CHI. TRIB., June 1, 1892, at 3.

³²⁴ *For an Institute*, CHI. TRIB., June 22, 1892, at 13; *Oppose Mrs. Daggett*, CHI. TRIB., June 21, 1892, at 13. Three of the four judges had previous involvement in lakefront litigation. Judge Tuley had previously worked as corporation counsel for the City of Chicago. Judge Horton had been an attorney in the 1869 lakefront case that Judge Drummond heard, apparently working for Ralph Starkweather. Judge Tuthill, as U.S. Attorney, had filed the suit against the Chicago Base Ball Club. See *Oppose Mrs. Daggett*, *supra*, at 13; *supra* note 245.

³²⁵ *Daggett*, 3 Ill. Cir. Ct. Rep. at 87. Judge Tuthill dissented from the denial of the injunction.

³²⁶ *Id.* at 87, 92.

³²⁷ 1890 Ill. Laws 5–6. Section 2 of the Act in Relation to the World's Columbian Exposition provided that all exposition buildings would be removed within a year after the fair, but that the City could purchase the buildings from the fair. It further provided:

If any owners of any lands or lots abutting or fronting on any such public grounds, or park grounds, or adjacent thereto, shall have any private right, easement, interest or property in such public or park grounds, appurtenant to their lands or lots, or otherwise, or any right to have such public or park grounds remain open or vacant and free from encroachments, [the State or the county can file an action] praying that the compensation [be determined] for such right, interest, easement or property, or for any interference with or damage thereto . . .

Id.

³²⁸ In the terminology introduced by Calabresi and Melamed, the panel reasoned that the statute transformed protection for the owners' entitlement from a "property rule" to a "liability rule." See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

whether Daggett would suffer any loss in the market value of her property by having the Art Institute constructed across the street, and it alluded to the traditional equity rule that an injunction will not issue in the absence of irreparable injury.³²⁹

The panel did not overturn the existing Leland injunction; it simply held that the injunction was modified to the extent necessary to permit construction of the Art Institute. With this ruling, Daggett's holdout ended. In order to appeal, she would have had to post a large bond,³³⁰ and this undoubtedly dissuaded her from taking further action. The building was still under construction when the World's Congress Auxiliary took possession in late spring 1893.³³¹

The Art Institute was the only substantial permanent building to be constructed in the park, and would remain so until the Millennium Park project more than a century in the future. Although Ward was not asked to give his consent to construction of the Art Institute, it is doubtful that he harbored any reservations about the project. His legal activity in 1892 and for some years afterwards was focused on nuisance-like conduct—unsightly loading platforms, shabby work sheds, and armory buildings used for dogfights.³³² Moreover, Ward served as a Governing Member of the Art Institute from 1888 to 1913, and as the museum commented after his death, “[d]uring all his years as the ‘watch-dog of the Lake Front’ he was always friendly to the Art Institute and considerate of its interests.”³³³

Although Ward was a passive bystander in the Art Institute fight, he found himself back in court in several disputes arising under the temporary injunction that he had obtained in 1890, which remained in force. In May 1891, the City petitioned the court to modify the injunction to allow it to issue a license to the Adam Forepaugh Circus to erect a tent in Lake Park.³³⁴

³²⁹ *Daggett*, 3 Ill. Cir. Ct. Rep. at 87–88. The City and the Art Institute had obtained affidavits from several consenting owners stating that the building would increase the value of their property. Affidavits of Orrington Lunt, Charles A. Winship & William F. Price, O. M. Powers, W. C. Ritchie, Leroy Payne, *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79 (Cook County, Ill., Cir. Ct. 1892) (No. 89C74794).

³³⁰ Bonds were a general prerequisite to the grant of an injunction under Illinois law: “[B]efore an injunction shall issue, the complainant shall give bond in such penalty, and upon such condition and with such security as may be required by the court, judge or master granting or ordering the injunction.” Ill. Rev. Stat. ch. 69, § 9 (1877). Courts had authority to dispense with the bonding requirement for good cause. *Id.* Having been denied an injunction by the panel of circuit judges, Daggett almost surely would have been required to post a large bond to obtain an injunction pending appeal. *Cf. Marks v. Columbia Yacht Club*, 219 Ill. 417, 420, 76 N.E. 582, 583 (1905) (upholding a significant award of damages against a Michigan Avenue property owner pursuant to a bond posted to secure an injunction on public dedication grounds).

³³¹ Cremin, *supra* note 26, at 184.

³³² *To Be a Fine Park*, CHI. TRIB., Jan. 24, 1893, at 6.

³³³ *Notes: Montgomery Ward*, 7 BULL. ART INST. CHI. 47, 47 (1914). Montgomery Ward is also listed as a Benefactor on the Art Institute's donor wall.

³³⁴ *See Small Boys Are Happy*, CHI. TRIB., May 12, 1891, at 9.

Ward opposed modification, arguing that a circus tent was no less a building than a permanent structure.³³⁵ Judge Hawes said that the park had been neglected by the City for twenty years, and he asked the parties to submit authorities on whether abutting property owners had standing to prevent temporary use of a “mud hole.”³³⁶ He eventually modified the injunction to allow the circus to go forward with the tent.³³⁷

In February 1892, the City sought permission to modify the injunction to allow another wigwam to be built, this time for the Democratic National Convention to be held during the coming summer.³³⁸ Ward initially objected along with other property owners,³³⁹ but he eventually consented, having been assured that the wigwam would be torn down immediately after the convention.³⁴⁰ Ward later regretted the decision, saying that “it took five years of litigation to undo the precedent thus established.”³⁴¹

In the winter of 1893, in a sign of Ward’s emerging leadership, the Michigan Avenue property owners met at the Montgomery Ward & Co. offices.³⁴² The owners collectively agreed to fund a project to beautify the park at their own expense, committing \$10,000 to the effort.³⁴³ The City evidently rejected the offer.

Three months later, in April 1893, the City of Chicago petitioned for a modification of the injunction to permit the Adam Forepaugh Circus to hold another circus in the park.³⁴⁴ In response, Ward and Thorne amended their original (1890) complaint, naming the proprietors of the Forepaugh Circus as defendants. The amended complaint reiterated the derelictions of the City in permitting sheds to be erected and garbage to be dumped in the park. But a good portion of the document was spent listing the reasons why the circus should not be allowed to operate in the park.³⁴⁵ On May 24, the court entered an order enjoining all defendants from “erecting any

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *City of Chicago v. Ward*, 169 Ill. 392, 394, 48 N.E. 927, 928 (1897); Transcript of Record, *supra* note 4, at 484–88 (petition of Adam Forepaugh Shows); *Small Boys Are Happy*, *supra* note 334.

³³⁸ *Ward*, 169 Ill. at 420, 48 N.E. at 936.

³³⁹ *Against the Democratic Wigwam*, CHI. TRIB., Apr. 3, 1892, at 3.

³⁴⁰ *Ward*, 169 Ill. at 420, 48 N.E. at 936. Hanecy demanded for Ward that the Democratic National Convention put up a \$15,000 guarantee that it would demolish the building when the convention was over. *Must Put Up a \$15,000 Guarantee*, CHI. TRIB., Apr. 15, 1892, at 6. Whether the Convention complied with this demand is unclear.

³⁴¹ A. Montgomery Ward, Letter to the Editor, *Mr. Ward Explains*, CHI. TRIB., Nov. 2, 1900, at 4. In the winter of 1893, the City successfully petitioned the court to allow it to dump snow in the park. Transcript of Record, *supra* note 4, at 32–33 (order granting petition).

³⁴² *To Be a Fine Park*, *supra* note 332.

³⁴³ *Id.*

³⁴⁴ Transcript of Record, *supra* note 4, at 33–34 (order granting petition).

³⁴⁵ *See id.* at 39–54 (amended complaint).

buildings, sheds, platforms [sic], tents, or other structures upon [Lake Park].³⁴⁶

Ward's attitude toward use of the lakefront nevertheless remained selective. In 1895, the City adopted a resolution allowing a temporary post office to be built in Lake Park until a permanent one could be built elsewhere.³⁴⁷ The City's corporation counsel wrote a legal opinion concluding that the City could not erect such a building without first obtaining permission from Ward and the other abutting property owners.³⁴⁸ After some equivocating, Ward gave his oral consent, which the federal authorities regarded as sufficient.³⁴⁹ Once the building was completed, however, he again drew the line. Postal carrier Leslie C. Whitaker had received permission to build a bicycle track next to the temporary post office building. Ward promptly obtained an injunction to stop this enterprise.³⁵⁰ When the post office decided to expand the temporary building, Merrick was back in court again.³⁵¹ He secured an injunction in state court, but when the case was removed to federal court, the injunction was dissolved. The Seventh Circuit reasoned that the "original plan" called for a larger post office than had been originally constructed, and thus Ward's consent should be construed to include the newly enlarged structure.³⁵²

C. *The Illinois Supreme Court Phase—Ward I*

For over thirty years, from 1864 to 1896, litigation over the construction of buildings in Lake Park was confined to courts in Chicago—the federal circuit court and the Cook County Circuit Court. Then, rather abruptly, the action shifted to the Illinois Supreme Court. The explanation for this is simple: the stakes were suddenly higher. In decisions rendered in 1892 and 1894, the U.S. Supreme Court resolved the uncertainty over who had title to Lake Park: the State of Illinois had title, and had delegated

³⁴⁶ *Id.* at 57–59.

³⁴⁷ *Id.* at 354–55 (reflecting resolution).

³⁴⁸ *Can't Allow Its Use*, CHI. TRIB., Mar. 13, 1895, at 8.

³⁴⁹ According to correspondence with federal authorities, Thorne signed an affidavit indicating that Ward had given his oral consent. Letter from George P. Merrick to John G. Carlisle, *supra* note 291. Merrick then wrote a letter to the Secretary of the Treasury and the Postmaster of Chicago denying that Ward had given his consent. *Id.* Two days later, however, Merrick followed up with another letter, withdrawing his repudiation of Thorne's affidavit and allowing the construction of the temporary post office building to move forward. Letter from George P. Merrick to John G. Carlisle, Sec'y of Treasury (June 22, 1895) (on file with the National Archives at College Park, Maryland). Whether this episode reflected an internal disagreement between Ward and Thorne, or Ward and Merrick, or simply miscommunication, is unclear.

³⁵⁰ *Court Bars Bike Track*, CHI. TRIB., June 19, 1897, at 1.

³⁵¹ *Ward v. Cong. Constr. Co.*, 99 F. 598, 598–99 (7th Cir. 1900).

³⁵² *Id.* at 600–01.

authority over the use of the park to the City of Chicago.³⁵³ This resolution of the title question, combined with the burst of civic energy associated with the Columbian Exposition, unleashed a flurry of plans to fill the park with permanent monumental structures. The City and its allies had to obtain a definitive resolution of the public dedication issue in order to proceed with these plans. The Michigan Avenue landowners had much less incentive to seek a ruling from a higher court, because they had consistently been winning in the local courts. But given the intense pressure for development of the lakefront, they too may have seen the wisdom of securing a more authoritative precedent interpreting the public dedication.

The inexorable movement to the state supreme court began when the City of Chicago brought a motion to compel Ward to “dispose of the issues now pending on demurrer,” and the court gave Ward ten days to respond.³⁵⁴ The demurrer was overruled on March 2, 1896.³⁵⁵ Testimony was then taken before Judge Brentano over a three-week period in June and July of 1896, supplemented by a massive documentary presentation detailing much of the history of the controversy over the park.³⁵⁶

After reviewing the voluminous record, Judge Brentano ruled in September 1896 that the temporary injunction previously issued in favor of Ward should be made permanent.³⁵⁷ His order prohibited the City and the Illinois Central from building any new railroad tracks, sheds, or other structures in the park.³⁵⁸ An exception was made for structures authorized by the ordinance passed on October 21, 1895, which contemplated construction of a new armory and parade ground for the Illinois National Guard in north Lake Park.³⁵⁹ The injunction also specifically exempted the Art Institute and the temporary post office, both of which, the court concluded, enjoyed owner consent.³⁶⁰ The next day an article appeared in the *Chicago Tribune* naming Ward the “watch dog of the lake-front,”³⁶¹ a

³⁵³ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); United States v. Ill. Cent. R.R. Co., 154 U.S. 225 (1894).

³⁵⁴ Transcript of Record, *supra* note 4, at 68. One of the defendants named in Ward’s original complaint filed a demurrer in 1890, but for reasons that are not clear, the court had never ruled on it. When the City decided to reactivate the litigation in 1896, the mechanism for doing so was to demand a ruling on the demurrer.

³⁵⁵ *Id.* at 69.

³⁵⁶ *See id.* at 93–542.

³⁵⁷ City of Chicago v. Ward, 169 Ill. 392, 395, 48 N.E. 927, 928 (1897).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 395–96, 421, 48 N.E. at 928, 936.

³⁶⁰ *Id.* at 396, 422, 48 N.E. at 928, 937.

³⁶¹ *One Year To Take Park*, CHI. TRIB., Sept. 15, 1896, at 12 (internal quotation marks omitted). The same newspaper had previously referred to Warren F. Leland by the same title. *See Watchdogs of the Lake-Front*, CHI. TRIB., Dec. 6, 1892, at 1. The first known published occurrence of the title is a *Chicago Tribune* article apparently quoting a statement from Sarah Daggett’s attorney. *Alone in the Fight*, *supra* note 316.

tagline that the paper would continue to use up to its publication of Ward's obituary.

The City promptly appealed to the Illinois Supreme Court. In a unanimous decision authored by Justice Carter, the court, on November 8, 1897, upheld the decree.³⁶² Most of the opinion was devoted to recapitulating the complex history of the park, from the initial marketing efforts of the Canal Commissioners and the United States through the balance of the nineteenth century.³⁶³ The court concluded that the restrictions on buildings included on the maps of 1836 and 1839 were legally binding public dedications.³⁶⁴ It explained that the City had accepted the dedications when it adopted the resolution of 1844 and the ordinance of 1847 designating the space as a public park, and that the City had thereby agreed to hold the land in trust for the public.³⁶⁵ These propositions were, as we have seen, relatively uncontroversial, given the Illinois Supreme Court's existing precedents on public dedications and the longstanding acceptance of the public dedication doctrine by local judges in Chicago in repeated disputes over the use of the park.

The court also held that the adjoining property owners had standing to enforce the dedication. The court's holding on the standing question was reinforced by language in the U.S. Supreme Court's second *Illinois Central* decision, where Justice Field had declared that

[t]he only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated . . . and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated.³⁶⁶

Again, this proposition was uncontroversial, given numerous previous decisions to the same effect.

The court also had little trouble concluding that it made no difference that Lake Park was dedicated by two different owners—the Canal Commissioners and the United States—at different times. Both had represented to prospective purchasers that the land east of Michigan Avenue would be clear of buildings.³⁶⁷ “Besides,” the court remarked, “this open space has always been treated by the city and the public as *one* park.”³⁶⁸

³⁶² *Ward*, 169 Ill. 392, 48 N.E. 927.

³⁶³ *See id.*

³⁶⁴ *Id.* at 402–03, 48 N.E. at 930.

³⁶⁵ *Id.* at 403, 48 N.E. at 930.

³⁶⁶ *Id.* at 417, 48 N.E. at 935 (quoting *United States v. Ill. Cent. R.R.*, 154 U.S. 225, 238–39 (1894)) (internal quotation marks omitted).

³⁶⁷ *Id.* at 418, 48 N.E. at 935.

³⁶⁸ *Id.*

Turning to the most seriously contested question, the court rejected the City's argument that the adjoining property owners were estopped from enforcing the public dedication because they had acquiesced in other violations of the restriction in the park.³⁶⁹ This, of course, had been Judge Drummond's rationale in 1882 for denying abutting landowners an injunction against the B&O depot.³⁷⁰ Since then, however, the owners had roused themselves, and the Illinois Supreme Court recounted the extensive record of litigation surrounding the park for over a decade.³⁷¹ The only recent exceptions, the court noted, were the Art Institute and the post office, and property owners had consented to their erection. It would not be appropriate, the court said, to find that the owners had "waived all of their rights in the premises because they may have chosen to waive some of them."³⁷²

In affirming the decree issued by Judge Brentano, no mention was made of the exemption in his decree for the new armory projected for the ongoing landfill activity in north Lake Park. This set the stage for the next round of litigation.

D. Ward Versus Everyone Else—Ward II and Ward III

Ward's next battles would be more difficult because the City wanted to add buildings that enjoyed widespread support among the civic elite, the local newspapers, and presumably a majority of the populace. *Ward I* was decided shortly after the Chicago City Council, pursuant to ordinances adopted in 1895 and 1896, had transferred title to Lake Park to the South Park Commissioners.³⁷³ The ordinances contemplated that the SPC would engage in a massive landfill, extending the park to the harbor line. The north portion of the new landfill was to be used for a National Guard armory and training ground, and the south portion developed by the SPC as an expanded park including new monumental public buildings. While Burnham continued to work on an overall design for the park, over the next several years the SPC concentrated on the landfill project.³⁷⁴ In 1899, the state legislature passed an act dedicating the new landfill for park purposes and renaming the expanded space "Grant Park."³⁷⁵ The SPC retransferred

³⁶⁹ *Id.*

³⁷⁰ See *The Lake-Front*, *supra* note 219; *supra* notes 219–20 and accompanying text.

³⁷¹ See *Ward*, 169 Ill. at 418–21, 48 N.E. at 935–36.

³⁷² *Id.* at 421, 48 N.E. at 937.

³⁷³ *Bliss v. Ward*, 198 Ill. 104, 117–18, 64 N.E. 705, 708 (1902).

³⁷⁴ *Cremin*, *supra* note 26, at 246. The fill was composed of street sweepings supplied by the city streets department and sludge dredged from the river and the canal. *Id.* at 247–48.

³⁷⁵ 1899 Ill. Laws 328.

title to the north portion of the landfill area to the State, and entered into contracts for construction of the armory.³⁷⁶

As soon as construction began on the armory, Ward filed a bill for an injunction on June 19, 1900.³⁷⁷ He prevailed in the trial court, and the defendant in the suit, the Board of Commissioners for the armory and parade grounds, appealed to the Illinois Supreme Court. The issue on appeal in *Ward II* was whether the public dedication recognized in *Ward I* applied only to the land west of the Illinois Central tracks, or also extended to new land east of the tracks created by landfill, such as the land to be used for the new armory.³⁷⁸

Ward argued that the issue had been resolved as to the entire park by *Ward I*. But the Illinois Supreme Court held that its previous decision had enforced the public dedication only as to lands west of the tracks.³⁷⁹ Nevertheless, the court decided that the dedication applied equally to the newly filled land east of the tracks. Justice Cartwright's opinion for the court was less than clear about the rationale for this conclusion. One reason appeared to be based on an analogy to natural accretion. If the original parkland had been augmented by natural accretion, no one would argue that the original dedication did not also apply to the expanded park. The court was "unable to see how any different rule can prevail" when the augmentation occurred by artificial filling.³⁸⁰ "In either case the extension grows upon the original park and becomes corporate with it and part of it,—in the one case by natural process, and in the other by artificial means, with the assent of the State."³⁸¹

This argument ignored the distinction between accretion—where riparian land is gradually and imperceptibly augmented—and avulsion—when the change is sudden and perceptible.³⁸² Title to land formed by accretion belongs to the riparian owner and is subject to the same restrictions as apply to the original land.³⁸³ But where riparian land is augmented by avulsion, title to the new land does not attach to the riparian

³⁷⁶ Bliss, 198 Ill. at 118–19, 64 N.E. at 708–09. The City wanted a new armory for several reasons. The violence of the recent Pullman Strike was doubtless on the minds of citizens when the project was approved. See *supra* note 98 and accompanying text. Additionally, even the City Council of Chicago was disappointed in the current condition of the park. *Old Buildings To Go*, CHI. TRIB., May 21, 1895, at 8.

³⁷⁷ See *Wants Armory Work Stopped*, CHI. TRIB., June 20, 1900, at 10.

³⁷⁸ Bliss, 198 Ill. at 112, 64 N.E. at 706.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 121, 64 N.E. at 709.

³⁸¹ *Id.*

³⁸² See 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 69 (1904).

³⁸³ The very first Illinois dedication case had held that additions to dedicated land caused by accretion are also subject to the dedication. *Godfrey v. City of Alton*, 12 Ill. 29, 36 (1850). However, it does not appear that any Illinois courts had previously extended a dedication to land added by avulsion, whether natural or artificial.

owner and instead remains where it stood before the change occurred.³⁸⁴ Many courts have held that artificial filling is a form of avulsion, not accretion.³⁸⁵ If this is correct, then it seems to follow that restrictions on title that inhere in the original riparian lands should not automatically extend to the newly formed landfill.

The court's decision also hinted at a more functional analysis: specifically, that extending the dedication to the newly created parkland was necessary in order to fulfill the purposes of the original dedication. "[T]he property owners on Michigan avenue bought their lots with the distinct understanding that there should never be any building between their lots and the lake."³⁸⁶ That being so, the court said, "when the limits of the park were extended into the lake, no right was acquired to erect buildings between the lots and the lake although at a greater distance from the lots."³⁸⁷ This reasoning is more persuasive, although it failed to take into account that structures erected farther from Michigan Avenue would obviously have a reduced impact on light, air, and view for owners of land abutting Michigan Avenue, at least relative to structures immediately opposite them in what had been the original Lake Park. In all events, another victory for Ward.

At this point, the disputes between Ward and the SPC turned to two monumental civic projects supported by private philanthropy. The principal properties and proposed construction sites are shown in Figure 15.

When John Crerar, a railroad mogul, died in 1889, he left \$2.5 million to the City of Chicago for a public library, as well as a separate \$100,000 bequest to support construction of a statue of Abraham Lincoln.³⁸⁸ In 1901, the City Council settled on the newly renamed Grant Park, between Madison and Monroe streets, as the location for these projects.³⁸⁹ The state legislature promptly passed an act authorizing both the Crerar Library and the statue to be built in Grant Park.³⁹⁰ The Act recognized the interests of the abutting property owners, and provided that consent had to be obtained from all owners before construction could begin.³⁹¹

³⁸⁴ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2598–99 (2010); see also FARNHAM, *supra* note 382, § 69.

³⁸⁵ See, e.g., *Stop the Beach*, 130 S. Ct. at 2611.

³⁸⁶ *Bliss*, 198 Ill. at 115, 64 N.E. at 707.

³⁸⁷ *Id.* at 115–16, 64 N.E. at 707.

³⁸⁸ Thomas W. Goodspeed, *John Crerar*, in *THE UNIVERSITY RECORD* 98, 117 (D.A. Henderson ed., 1920); see *Crerar Lincoln Monument Plans Nearly Completed*, CHI. TRIB., Feb. 21, 1907, at 9.

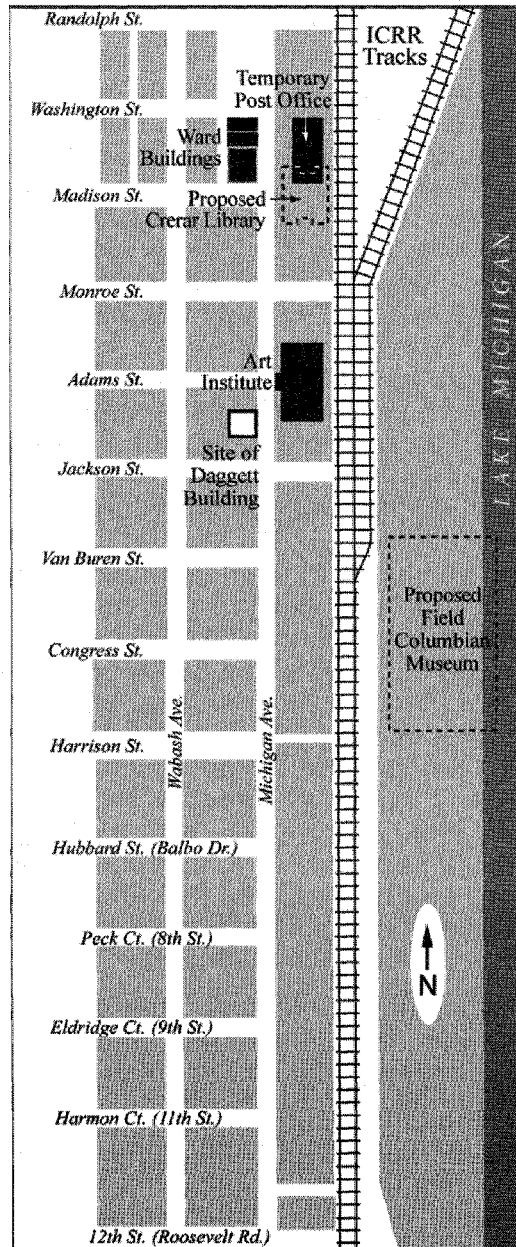
³⁸⁹ *Favors the Crerar Plan*, CHI. TRIB., Mar. 19, 1901, at 1.

³⁹⁰ 1901 Ill. Laws 232. The commission for the Lincoln statue had been awarded to the famous sculptor, Auguste St. Gaudens, in 1897, and the project was expected to take three years. *Favors the Crerar Plan*, *supra* note 389. St. Gaudens's "Lincoln" still stands in Grant Park.

³⁹¹ 1901 Ill. Laws 233.

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FIGURE 15: CERTAIN MICHIGAN AVENUE AND GRANT PARK PROPERTIES CIRCA 1903



George Merrick, Ward's attorney, initially responded to the Act by saying that Ward would not consent to any buildings in the park.³⁹² A few weeks later, Merrick issued another statement, saying that Ward would consent to the library, but only if it were built south of Jackson Boulevard—that is, south of the Art Institute, rather than to the north where Ward's property lay.³⁹³ The SPC responded that Ward's condition was unacceptable.³⁹⁴ The commissioners were adamant that the library be placed to the north of the Art Institute.³⁹⁵

The directors of the library quickly obtained consents from most of the other property owners on Michigan Avenue, and indicated that they would go to court to overturn the Act's requirement of unanimous consent from abutting owners.³⁹⁶ But it appears that they did not do this. Instead, in 1903, the legislature enacted a statute permitting the SPC to condemn the rights of abutting owners.³⁹⁷ In early 1905 the SPC gave final approval to build the Crerar Library on the lakefront,³⁹⁸ and the board of directors for the library accepted the SPC's ordinance.³⁹⁹ The contractors would set up their equipment and prepare to break ground.⁴⁰⁰

Merrick immediately initiated contempt proceedings on Ward's behalf.⁴⁰¹ In a tacit recognition that Ward was moving against the tide of public opinion, Merrick simultaneously issued a statement to the press attempting to neutralize the reaction.⁴⁰² The statement declared that Ward was "misunderstood" and that he was merely trying to preserve the park for the people of Chicago. The statement also accused the library directors and SPC officials of acting lawlessly in blatant disregard of the decision in *Ward II*.⁴⁰³

A hearing on the matter was held on June 25, 1906, and Elbridge Hanecy, who was no longer on the bench, argued the case for Ward.⁴⁰⁴ He called on the court to sanction the SPC and the library board for their "outrageous conduct."⁴⁰⁵ The library board and the SPC, taking a page from the panel decision in the *Daggett* case, argued that the 1903 Act giving the

³⁹² *Favors the Crerar Plan*, *supra* note 389.

³⁹³ *Expect Ward To Give In*, CHI. TRIB., Apr. 10, 1901, at 7.

³⁹⁴ *Id.*

³⁹⁵ *See id.*

³⁹⁶ *Court May Pick Crerar Site*, CHI. TRIB., Apr. 12, 1901, at 7.

³⁹⁷ 1903 Ill. Laws 262.

³⁹⁸ *See S. Park Comm'rs, Meeting Minutes 160–62 (Dec. 15, 1909); To Start Crerar Library*, CHI. REC.-HERALD, June 22, 1906.

³⁹⁹ *See S. Park Comm'rs*, *supra* note 398, at 162.

⁴⁰⁰ *To Start Crerar Library*, *supra* note 398.

⁴⁰¹ *Renews Lake Front Fight*, CHI. TRIB., June 24, 1906, at 1.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ "Watchdog" Given Contempt Order, CHI. TRIB., June 26, 1906, at 7.

⁴⁰⁵ *Id.* (internal quotation marks omitted).

SPC the power to condemn easements in the park eliminated Ward's right to injunctive relief.⁴⁰⁶ In effect, the power to condemn should be treated as if an actual condemnation had occurred—minus the payment of compensation, which Ward would have to obtain through a later action for damages.⁴⁰⁷

Judge Brentano, who had issued the 1896 injunction that was upheld in *Ward I*, did not buy the argument that an unexercised power of eminent domain was sufficient to deprive a court of equity of the power to enforce a public dedication. He issued an order giving the library board and the SPC until July 16, 1906, to show cause why they should not be held in contempt of court.⁴⁰⁸ A few days later, he ordered all building materials removed from the lakefront.⁴⁰⁹

At this point, the legal fight over the Crerar Library abated. Although the library's attorney was quoted by one newspaper as saying that the matter should go to the Illinois Supreme Court, where "it will be a totally new case" as a result of the 1903 legislation,⁴¹⁰ no appeal was filed. Litigation costs do not seem to have been the decisive factor; it is more likely that the library concluded that the theory about an unexercised power of eminent domain was a loser and that the proponents of new park structures should proceed directly to condemnation. This seems confirmed by the fact that the library trustees later funded condemnation proceedings to acquire the rights of Michigan Avenue owners at the same time the SPC undertook to condemn the owners' rights to object to the Field Museum.⁴¹¹ Eventually, after the condemnation effort also failed,⁴¹² the library trustees settled on a location just outside the park, on the northwest corner of Michigan Avenue and Randolph Street.

As litigation over the Crerar Library subsided, the battle flared with new intensity on another front: the Field Museum. After the World's Columbian Exposition closed in 1893, Marshall Field began a campaign to house the natural history artifacts in a permanent museum. He donated more than \$1 million in initial funding and encouraged others to donate their World's Fair stock to such a museum.⁴¹³ Ward, ironically, was the largest contributor, donating 1000 shares.⁴¹⁴ The museum was incorporated

⁴⁰⁶ See *supra* notes 324–29 and accompanying text.

⁴⁰⁷ "Watchdog" Given Contempt Order, *supra* note 404.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Must Take Workmen's Sheds from Crerar Library Site*, CHI. TRIB., June 30, 1906, at 12.

⁴¹⁰ *Library Board Firm*, CHI. REC.-HERALD, June 28, 1906. The attorney told the *Tribune* that the library board would either appeal the decision or begin condemnation proceedings. *Library Without a Home*, CHI. TRIB., July 3, 1906, at 5.

⁴¹¹ *Crerar Trustees in Lake Front War*, CHI. TRIB., Oct. 28, 1909, at 6.

⁴¹² See *infra* Part IV.E.

⁴¹³ *Funds To Buy Curios*, CHI. TRIB., Nov. 4, 1893, at 8.

⁴¹⁴ *Id.*

as the Columbian Museum of Chicago and was originally housed in one of the buildings built for the fair on the South Side.⁴¹⁵ As early as 1896, Field and others wanted to construct a larger building in Grant Park. The mayor had added a provision to the 1896 ordinance, directing that the Field Museum be constructed in the park.⁴¹⁶ However, the South Park Commissioners were reluctant to commit to a specific location until the final plans for the park system were complete.⁴¹⁷ The commissioners were also concerned about the legality of building in the park, which was in obvious tension with the rulings in *Ward I* and *II*.⁴¹⁸

The plans for the museum were shelved for several years while the SPC cleaned up the park and planned the next move.⁴¹⁹ In early 1903, Marshall Field announced that he would donate funds for the “handsomest museum building in the world” to house the museum collections on the lakefront.⁴²⁰ Several bills were proposed to the state legislature in connection with the museum building, including the previously mentioned 1903 Act allowing the SPC to condemn the rights of nonconsenting abutting property owners to facilitate construction of the museum.⁴²¹ Consents for the museum from abutting owners were slowly obtained.⁴²²

With plans for fixing the location of the museum stalled, garbage began to pile up in the park again. Public discontent over Ward’s decision to block the building grew, fueled by remarks from SPC leaders reported in the newspapers.⁴²³ SPC President Henry G. Foreman threatened to “turn the front yard of the city into a rubbish heap” and to abandon all plans to maintain or improve Grant Park if the museum could not be built on the lakefront.⁴²⁴ In response to growing public criticism, Merrick released a statement to the *Tribune* describing the history of the park and defending

⁴¹⁵ *History of the Museum*, FIELD MUSEUM, <http://fieldmuseum.org/about/history-museum> (last visited Aug. 19, 2011).

⁴¹⁶ *Mayor Signs Lake-Front Ordinance*, CHI. TRIB., Sept. 16, 1896, at 3; see *supra* notes 93–100 and accompanying text.

⁴¹⁷ *Can Fix a Museum Site*, CHI. TRIB., Nov. 22, 1896, at 6.

⁴¹⁸ *One Year To Take Park*, *supra* note 361.

⁴¹⁹ *Lost: One City Park*, CHI. TRIB., Sept. 2, 1903, at 1.

⁴²⁰ *Will Watch Dog Be Manger Dog?*, CHI. TRIB., Feb. 20, 1903, at 1 (internal quotation marks omitted).

⁴²¹ *Muzzle for Lake Front Watchdog*, CHI. TRIB., Mar. 18, 1903, at 5; see *supra* notes 397, 406, 410 and accompanying text.

⁴²² Significantly, though, a number of owners now joined with Ward in objecting to the plan. *Two New Parks Planned*, CHI. TRIB., Dec. 17, 1903, at 16. The article states that Ward was joined by at least a dozen other objectors. *Id.*

⁴²³ *Proposed Home of Field Museum To Be Erected on Lake Front, Work Beginning About Feb. 15*, CHI. TRIB., Jan. 24, 1907, at 4; see also *Museum Plans Turned In*, CHI. TRIB., Jan. 23, 1907, at 18.

⁴²⁴ *South Park Man Plans Reprisals*, CHI. TRIB., Nov. 28, 1903, at 10 (internal quotation marks omitted).

the idea of a park free of buildings.⁴²⁵ In early 1904, the SPC submitted a proposal to the voters for approval of a tax to support the museum, which passed overwhelmingly.⁴²⁶

Marshall Field died on January 16, 1906, leaving \$8 million to the City of Chicago for the express purpose of building the Field Museum.⁴²⁷ His will provided that the bequest would revert to his estate if a site was not chosen for the museum within six years of his death.⁴²⁸ Although Field's will did not expressly require the site to be Grant Park,⁴²⁹ SPC officials and the museum's trustees implied as much. Harlow Higinbotham, president of the museum trustees, declared that there was only one site available in the City and that, if Ward successfully kept the museum off the lakefront, it would amount to "the ruin of what otherwise ultimately will be the greatest museum in the world."⁴³⁰

In early 1907, the SPC adopted an ordinance granting the museum a tract of land at the foot of Congress Street on the east side of the Illinois Central tracks—in the center of Grant Park but half a mile south of Ward's building at Madison Street.⁴³¹ Ward was not in the City when the news was released.⁴³² When the newspapers contacted Merrick for a response, he said that Ward would not take immediate action and would wait for some overt action before going to court.⁴³³ Higinbotham stated that Ward was the only remaining objector and dared others in opposition to come forward.⁴³⁴ He declared that Ward had no right to contest the museum building because the people of the City had already voted on it.⁴³⁵

⁴²⁵ *Makes Plea for Park "Watch Dog,"* CHI. TRIB., Dec. 27, 1903, at 3. Merrick indicated that he had provided advice to other abutting property owners, but the only name mentioned was Ward. *Id.*

⁴²⁶ S. Park Comm'rs, Meeting Minutes 7 (July 10, 1909).

⁴²⁷ *Museum Loss Feared,* CHI. REC.-HERALD, Nov. 21, 1908.

⁴²⁸ *Id.*

⁴²⁹ Will of Marshall Field § 17, at 35–40 (Sept. 5, 1905) (on file with Chicago History Museum).

⁴³⁰ *Fight on Museum Starts in Court,* CHI. TRIB., Feb. 24, 1907, at 3 (internal quotation marks omitted).

⁴³¹ *Field Museum Gets Site,* CHI. TRIB., Jan. 22, 1907, at 9.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* Higinbotham was a partner in Field, Palmer & Leiter. He had personally contributed \$100,000 to the Field Museum project and served as president of the museum's board of trustees for several years. GILBERT & BRYSON, *supra* note 22, at 736; *Head of Museum Really Deposed,* CHI. TRIB., Jan. 22, 1909, at 7. Higinbotham was a strong-willed character who had previously served as president of the Columbian Exposition. See LARSON, *supra* note 90, at 309. It is perhaps not surprising that he reacted poorly to Ward's opposition to the trustees' preferred plan for the museum. In one interview with the *Tribune*, he declared that "[w]e must have a new structure or stop developing—and that means stop existing." *Fight on Museum Starts in Court,* *supra* note 430 (internal quotation marks omitted). Higinbotham's pugilistic attitude eventually got him fired from the board of trustees. *Head of Museum Really Deposed,* *supra.* Higinbotham was at Field's department store at the same time as Elbridge

As final preparations for construction began, Merrick met with John Barton Payne, attorney for the museum trustees, to discuss the situation.⁴³⁶ Payne was concerned about the cost of entering into construction contracts that would be delayed by litigation, and they planned a symbolic act of driving a stake into the ground so that litigation could be started.⁴³⁷ Merrick filed a twenty-nine-page petition for an injunction on February 23, 1907.⁴³⁸ The SPC filed a cross-bill to enjoin Ward from interfering with construction.⁴³⁹

The matter was assigned to Judge George Dupuy, who had served as counsel to the City in *Ward I* before joining the bench and was clearly hostile to Ward's position. Hanecy engaged in some vigorous maneuvering to get the case reassigned, but to no avail.⁴⁴⁰ Judge Dupuy overruled Hanecy's demurrer to the cross-bill, holding that buildings consistent with "park purposes" would be allowed in the park.⁴⁴¹ In so ruling, Judge Dupuy implicitly adopted the understanding that the dedication was an affirmative command to use the space for park purposes, ignoring the language on the original maps expressed in terms of a negative restriction on "buildings."

The case went to trial in October 1908. In the meantime, Ward offered to settle the matter and allow the museum in Grant Park, as long as the SPC would agree not to sponsor any more buildings.⁴⁴² The SPC immediately rejected Ward's offer, saying that they did not want to go "hat in hand" to Ward every time they wanted to build in the park.⁴⁴³ The parties' patience had grown thin by this time, and courtroom discussions were often heated.⁴⁴⁴

At the close of evidence, Judge Dupuy denied Ward an injunction against the museum and further enjoined Ward from interfering with construction in the park.⁴⁴⁵ Judge Dupuy concluded that *Ward I* and *Ward*

Hanecy, and the friction between them in the Field Museum fight may have reflected a rivalry of longer standing.

⁴³⁶ *Field Museum Plans Ready for Ward's Lightning Bolt*, CHI. TRIB., Feb. 9, 1907, at 9.

⁴³⁷ *Id.*

⁴³⁸ *Fight on Museum Starts in Court*, *supra* note 430.

⁴³⁹ Abstract of Record at 67, *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N.E. 731 (1909) (No. 6657-11).

⁴⁴⁰ Ward's attorneys moved for a change in venue. See *Lake Front Suit Hits Snag in Court Order*, CHI. REC.-HERALD, Nov. 20, 1908; *No Gain to Ward in Museum Ruling*, CHI. TRIB., Nov. 24, 1908, at 2. Hanecy also tried to withdraw Ward's petition, presumably to refile it in the hope of securing a different judge, but this too was blocked on the ground that the petition could not be withdrawn once a cross-bill had been filed. *"Watchdog" Ward Must Face Issue*, CHI. TRIB., Oct. 9, 1907, at 6.

⁴⁴¹ *Lake Front Open to Park Houses*, CHI. TRIB., Jan. 25, 1908, at 1.

⁴⁴² *Ward Explains War on Museum*, CHI. TRIB., Nov. 26, 1908, at 4.

⁴⁴³ *Offer Spurned by Park Board*, CHI. TRIB., Nov. 27, 1908, at 5.

⁴⁴⁴ In one incident, Hanecy kicked a map that Payne had tossed at him. Judge Dupuy dismissed the incident—perhaps he was hesitant to discipline two former judges. *Hanecy Kicks Map in Court*, CHI. TRIB., Oct. 9, 1908, at 5.

⁴⁴⁵ *Site for Museum Seems Assured*, CHI. TRIB., Dec. 10, 1908, at 6.

II were not controlling because neither the SPC nor the museum had been a party to the earlier cases.⁴⁴⁶ He went on to divide the park in two, holding that although *Ward I* prohibited all buildings on the west side of the Illinois Central tracks, *Ward II* left open the possibility that “proper park buildings” could be built on the east side of the tracks.⁴⁴⁷ Judge Dupuy found that the Field Museum was a proper park building and hence could be built.⁴⁴⁸ Both Ward and the SPC were unhappy with the decision—the South Park Commissioners were still hoping to build the Crerar Library and a new city hall on the west side of the Illinois Central tracks—and immediately appealed to the Illinois Supreme Court.⁴⁴⁹

The high court reversed, ruling for Ward once again.⁴⁵⁰ The court held that *Ward I* and *Ward II* were fully applicable to the SPC, who stood in the shoes of the City.⁴⁵¹ The City could not circumvent the previous rulings by transferring the park to another municipal corporation.⁴⁵² The court also held that there was no basis for dividing the park in two because the court in *Ward II* had already determined that the reclaimed land was of the same character as the rest of the park, just as if the additional land had naturally accreted.⁴⁵³ The court summarily dispensed with Judge Dupuy’s idea that “proper park buildings” could be erected in the park.⁴⁵⁴ Ward was not concerned with the *type* of buildings that could be allowed in the park; rather, he claimed that *no* buildings could be erected in the park.⁴⁵⁵

This was a seemingly decisive blow in favor of the no-buildings conception of the dedication. Nevertheless, the court went on to address the SPC’s argument that certain buildings are absolutely necessary in a park, such as rain shelters, band shells, and lavatories.⁴⁵⁶ Those types of facilities, the court agreed, “can be provided without the erection of what would properly be characterized as a building.”⁴⁵⁷ This was as close as the Illinois Supreme Court would come to offering a definition of “building” in the *Ward* cases. Its reasoning was opaque, but the idea that the dedication was at least in part for “park purposes” seemed to creep into the discussion of the meaning of the term. It was not clear whether the court regarded certain kinds of structures as being too important to be excluded from the park and

⁴⁴⁶ *Field Museum Wins; Ward Fight Delayed*, CHI. REC.-HERALD, Dec. 10, 1908, at 3.

⁴⁴⁷ *Ward v. Field Museum of Natural History*, 241 Ill. 496, 506–07, 89 N.E. 731, 735 (1909).

⁴⁴⁸ *Field Museum Wins; Ward Fight Delayed*, *supra* note 446.

⁴⁴⁹ *Ward*, 241 Ill. at 507, 89 N.E. at 735.

⁴⁵⁰ *Id.* at 510, 89 N.E. at 737.

⁴⁵¹ *Id.* at 509, 89 N.E. at 736.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 507, 89 N.E. at 735.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 507–08, 89 N.E. at 735–36.

⁴⁵⁶ *Id.* at 510, 89 N.E. at 736.

⁴⁵⁷ *Id.*

hence not “buildings,” or, more likely, whether it thought that the listed structures were so innocuous that they did not jeopardize the interests of the abutting landowners and hence should not be deemed “buildings,” or some combination of both.

A triumphant Ward finally gave the *Tribune* an interview following the decision.⁴⁵⁸ He said that his fight was “for the poor people of Chicago—not for the millionaires.”⁴⁵⁹ He was not opposed to the museum on the lakefront, but came to understand that the SPC had “nineteen” other projects lined up, and he feared that the park would become riddled with buildings if he did not object.⁴⁶⁰ He also said that if he had known how much the fight was going to cost, in both time and money, he might not have started it, adding, with more than a touch of self-pity, that this was especially so because he was not even receiving gratitude in return.⁴⁶¹

Perhaps as an implicit quid pro quo for the interview, the *Tribune*, an erstwhile booster of the museum, printed an editorial the next day commending Ward for his perseverance in protecting the park.⁴⁶²

E. The SPC Moves to Condemn Ward’s Interest—Ward IV

Following the defeat in *Ward III*, the South Park Commissioners announced that they would begin condemnation proceedings against Ward’s interest in the park.⁴⁶³ The 1903 Act had given the SPC the power to condemn the rights of any nonconsenting abutting property owner.⁴⁶⁴ Throughout the *Ward III* proceedings, the SPC had threatened condemnation and indicated that they would keep their ability to condemn the abutting owners’ rights as a backup plan.⁴⁶⁵ Both the president of the Crerar Library, on behalf of the directors, and the trustees of the Field Museum wrote to the SPC, asking the commissioners to start condemnation proceedings.⁴⁶⁶ The board of the Crerar Library offered to pay the SPC’s legal fees, and a contract to that effect was drafted in December 1909.⁴⁶⁷

The SPC filed the condemnation action on January 27, 1910.⁴⁶⁸ In addition to Ward and his company, the suit named as condemnees Levy Mayer, who owned the Stratford Hotel, and S. Karpen & Bros. and several

⁴⁵⁸ *Moving To Block Victory of Ward*, CHI. TRIB., Oct. 27, 1909, at 1.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² Editorial, *Mr. Ward and the Field Museum*, CHI. TRIB., Oct. 28, 1909, at 10.

⁴⁶³ *Moving To Block Victory of Ward*, *supra* note 458.

⁴⁶⁴ 1903 Ill. Laws 263–64; *see also supra* note 421 and accompanying text.

⁴⁶⁵ *Fight on Museum Starts in Court*, *supra* note 430.

⁴⁶⁶ S. Park Comm’rs, *supra* note 398, at 160, 163.

⁴⁶⁷ *Id.* at 160–62.

⁴⁶⁸ *New Move Taken for Museum Site*, CHI. TRIB., Jan. 28, 1910, at 13.

banks.⁴⁶⁹ These were not the only nonconsenting property owners, and the SPC indicated that if they were successful in the first proceeding more condemnation actions would follow.⁴⁷⁰

The first hearing came up several weeks later.⁴⁷¹ Henry Russell Platt of Levy Mayer's law firm represented the condemnees, including Ward.⁴⁷² Platt argued that condemnation of the abutting owners' rights was not a proper public use under the constitution. The public would be injured, not benefited, he contended, by condemning the restriction on buildings in the park. Moreover, the condemnation was for the benefit of private entities, the Field Museum and the Crerar Library, not public authorities.⁴⁷³

Two weeks later, Judge William H. McSurely dismissed the condemnation action.⁴⁷⁴ He said he was satisfied that the previous suits had determined the rights of all of the parties, including the right of the SPC to condemn any "easement[]" that Ward might have.⁴⁷⁵ The SPC immediately appealed to the Illinois Supreme Court.⁴⁷⁶

Ward won yet again in the Illinois Supreme Court, but for the first time the court was closely divided, ruling by a vote of four to three. With respect to whether the SPC could condemn Ward's interest in the park, the court acknowledged that the power of eminent domain extends to every kind of property or interest.⁴⁷⁷ Nevertheless, the legislature could not authorize a taking for an illegal use.⁴⁷⁸ The previous *Ward* cases had established that it was unlawful to erect buildings in the park.⁴⁷⁹ Therefore,

⁴⁶⁹ *Park Board in Suit for a Museum Site*, CHI. REC.-HERALD, Jan. 29, 1910, at 9. Levy Mayer, cofounder of the firm that is now Mayer Brown LLP, was named personally in the complaint. Complaint at 3, *S. Park Comm'rs v. S. Karpen & Bros.*, No. 10S277375 (Cook County, Ill., Super. Ct., Mar. 24, 1910); *Join Ward in Museum Suit*, CHI. TRIB., Feb. 12, 1910, at 9. Mayer's notable career included successfully defending the Chicago meatpackers against prosecution under the Sherman Act and representing Charles Comiskey and his "Black Sox" after the alleged 1919 World Series scandal. *About Mayer Brown*, MAYER BROWN, <http://www.mayerbrown.com/about/index.asp?nid=10113> (last visited Aug. 23, 2011). After his death, Mayer's wife, Rachel, donated \$500,000 to Northwestern University for the construction of a law building on the Chicago campus. Leigh Bienen, *The Life and Times of Florence Kelley in Chicago 1891-1899: Levy Mayer*, NW. U., <http://florencekelley.northwestern.edu/historical/mayer/> (last visited Aug. 23, 2011). The building, known as "Levy Mayer Hall," is still in use today.

⁴⁷⁰ *Park Board in Suit for a Museum Site*, *supra* note 469.

⁴⁷¹ *Park Site Fight Opened in Court*, CHI. TRIB., Mar. 1, 1910, at 14.

⁴⁷² *Id.* When the case was appealed to the Illinois Supreme Court, George Merrick again represented Ward, and Mayer represented himself and S. Karpen & Bros. See *S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1910).

⁴⁷³ *Park Site Fight Opened in Court*, *supra* note 471.

⁴⁷⁴ *Dismisses Suits of Field Museum*, CHI. TRIB., Mar. 15, 1910, at 11.

⁴⁷⁵ *Id.*

⁴⁷⁶ See *id.*

⁴⁷⁷ *S. Park Comm'rs*, 248 Ill. at 304-05, 93 N.E. at 912.

⁴⁷⁸ *Id.* at 305, 93 N.E. at 912.

⁴⁷⁹ *Id.*

the court reasoned, the legislature could not authorize a taking of Ward's interest, because the use for which the SPC wanted to take it was unlawful.⁴⁸⁰

The court then summarized its previous holdings on dedications. Under these decisions, once a donor dedicates property to the public with restrictions, "the public authorities having their election to accept or reject the donation, are bound, if they accept it, to apply the property to the declared use."⁴⁸¹ This meant that the City was bound by its previous acceptance of the dedication of the parkland with the restriction that it would be kept free from buildings.⁴⁸² The City could not escape the consequences of its decision through the device of eminent domain.

The court reinforced its decision with two other arguments. First, it rejected the SPC's contention that Ward's interest was in the nature of an easement and therefore could be condemned because easements are property rights subject to condemnation.⁴⁸³ The court explained that in the previous cases Ward had secured equitable enforcement of a restriction on the use of the park that affected his property values. However, Ward would not have been able to obtain an injunction if he had had an easement; under Illinois law, the only remedy for interference with an easement was an award of money damages.⁴⁸⁴

The court also supported its holding on res judicata grounds.⁴⁸⁵ The 1903 Act allowing the SPC to condemn Ward's easement had been passed before the litigation in *Ward III*, the court said, and the SPC had brought it up as a defense to Ward's injunction action.⁴⁸⁶ Moreover, the reasoning went, the equity court would not have given Ward the injunction if the use had been lawful under the 1903 Act.⁴⁸⁷

Justice Dunn, dissenting in an opinion joined by two other justices, pointed out the weaknesses in the majority's reasoning. The res judicata argument was unavailing, he wrote, because the previous cases were about whether buildings could be erected in the park.⁴⁸⁸ In those cases, the Illinois Supreme Court had expressly stated that it was not ruling on whether Ward's rights could be taken by condemnation.⁴⁸⁹

⁴⁸⁰ *Id.* at 306, 93 N.E. at 913.

⁴⁸¹ *Id.* at 308, 93 N.E. at 914.

⁴⁸² *See id.*

⁴⁸³ *Id.* at 310–11, 93 N.E. at 914.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 312, 93 N.E. at 915.

⁴⁸⁶ *Id.* As previously described, the power of eminent domain conferred by the 1903 Act had been the SPC's principal argument in *Ward III* as to why a court of equity should deny injunctive relief. *See supra* notes 406–07 and accompanying text.

⁴⁸⁷ 248 Ill. at 312, 93 N.E. at 915.

⁴⁸⁸ *Id.* at 316, 93 N.E. at 916 (Dunn, J., dissenting).

⁴⁸⁹ *Id.* at 317, 93 N.E. at 917.

Dunn then turned to whether the City could use eminent domain to develop the park. He asserted that eminent domain is an inherent attribute of sovereignty, and that the State could not divest itself of its condemnation powers by accepting a dedication with restrictions.⁴⁹⁰ The State could not deprive itself of the right of eminent domain through contract because contract rights themselves are subject to eminent domain.⁴⁹¹ The government must be able to use the land within its power for the changing needs of the public.⁴⁹²

Dunn argued that the majority's position, taken to its logical conclusion, would mean that if the entire lakefront had been dedicated and placed in trust, then the City could allow no streets, docks, or wharves along the lakefront.⁴⁹³ Surely the City could not deprive itself of its ability to make use of the navigable waterway.⁴⁹⁴ Without defining the interest held by Ward and the other abutting property owners, Dunn concluded that although the dedication created a right that required the assent of all property owners before buildings could be built in the park, "the acquisition of such right to object is equivalent to obtaining their assent."⁴⁹⁵

Justice Carter—who had authored the opinion in *Ward I*—wrote a separate dissent. He stated that "all private rights are held upon the implied condition that they may be re-taken by the sovereign."⁴⁹⁶ Again assuming that the dedication was contractual in nature, Carter argued that the City and the State had no power to accept the dedication if acceptance included a waiver of their sovereign powers of eminent domain.⁴⁹⁷

By today's lights, *Ward IV* seems hard to defend.⁴⁹⁸ If one assumes that the acquisition of land for a museum open to the public is a public

⁴⁹⁰ *Id.* at 322, 93 N.E. at 918.

⁴⁹¹ *Id.* at 324, 93 N.E. at 919.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 325, 93 N.E. at 919.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 334, 93 N.E. at 923.

⁴⁹⁶ *Id.* at 337, 93 N.E. at 924 (Carter, J., dissenting).

⁴⁹⁷ *Id.*

⁴⁹⁸ *Ward IV* was in fact overruled by the Illinois Supreme Court in 1961 in an opinion written by Chief Justice Walter V. Schaefer, but the opinion was later withdrawn on rehearing. A lawsuit had been filed to stop the University of Illinois from locating a Chicago branch in Garfield Park. When the case reached the Illinois Supreme Court, the court not only permitted the transfer of parkland to the University, but also overruled *Ward IV*. *People v. Chi. Park Dist.*, Nos. 36171-72 (Ill. 1960), *withdrawn*; Thomas Buck, *Rule U. of I. May Use Garfield Park Site*, CHI. TRIB., Jan. 18, 1961, at 1. The court withdrew its opinion before publication on a motion for rehearing filed by, among others, Michigan Avenue property owners, ruling that the issue was moot because the University of Illinois had selected another site for its Chicago campus. Thomas Buck, *Ruling on Park Use Cancelled by High Court*, CHI. TRIB., Mar. 24, 1961, at B2; *Michigan Av. Suit Attacks Park Decision*, CHI. TRIB., Feb. 9, 1961, at A10; *see also* Comment, *The Status of Dedicated Land in Illinois*, 11 DEPAUL L. REV. 61, 61-62 (1961).

use,⁴⁹⁹ then the State should be allowed to condemn all interests in land necessary to secure such a public use, whether those interests are characterized as property rights, contract rights, or equitable interests. Perhaps the closest analogue to *Ward IV* in modern eminent domain law is the understanding that land acquired for one public use cannot be condemned for another public use without express legislative authorization.⁵⁰⁰ *Ward IV* holds that land dedicated to a public use cannot be condemned for another public use. The problem with the analogy is that the SPC *did* have express legislative authority for the condemnation to change public uses, which should have been the end of the matter.

In retrospect, the commissioners and their allies overreached by failing to proceed toward condemnation immediately after the decisions in *Ward I* and *Ward II*. Instead, they sought to rely on a statutory power to condemn without actually going through the condemnation process. This made it look as if they were trying to take a valuable right without paying for it, and were willing to pay only after they were called out. It is not surprising that a majority of the Illinois Supreme Court took a dim view of these tactics. The directors of the Crerar Library evidently had seen this coming, but the SPC and Higinbotham were apparently so exercised by Ward's opposition that it impaired their judgment.

In any event, *Ward IV* had a decisive impact on the future of Grant Park. It is virtually certain that if the decision had gone the other way, the Illinois legislature would have granted the SPC the power to condemn the interests of the abutting owners for a variety of projects. Since *Ward IV* would likely not be followed today, this suggests an important limitation on the efficacy of the public dedication doctrine and the unanimous consent mechanism as an instrument for preserving public spaces: namely, that these rights can be condemned by eminent domain.

Following the decision in *Ward IV*, the Field Museum trustees had to scramble to find a site outside the protected area, and they had to find it fast if they were to avoid losing the bequest.⁵⁰¹ On March 15, 1911, the trustees formally asked the SPC to rescind the contract providing a site in Grant Park and to approve a location south of the public dedication area between 12th and 16th Streets.⁵⁰² A few days later, the SPC and the museum trustees

⁴⁹⁹ The U.S. Supreme Court has held that eminent domain can be used for memorial grounds and parks. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896) (upholding the use of eminent domain to acquire part of Gettysburg battlement for memorial cemetery); *Shoemaker v. United States*, 147 U.S. 282 (1893) (upholding the use of eminent domain to acquire land for Rock Creek Park).

⁵⁰⁰ See, e.g., *Ill. Cent. R.R. v. Chi., Burlington & N. R.R.*, 122 Ill. 473, 482, 13 N.E. 140, 143 (1887); 2 PHILIP NICHOLS, *THE LAW OF EMINENT DOMAIN: A TREATISE ON THE PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR THE PUBLIC USE* § 361 (2d ed. 1917); 1A JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 3.03[3][d] (3d ed. 2010).

⁵⁰¹ Under Field's will, the bequest would expire and revert to the estate six years after he died, or on January 16, 1912. Will of Marshall Field, *supra* note 429, § 17, at 39–40.

⁵⁰² S. Park Comm'rs, Meeting Minutes 106 (Mar. 13, 1911).

entered into a contract for the new site.⁵⁰³ In May of that year, the state legislature enacted legislation allowing the SPC to build the museum on the new site.⁵⁰⁴ The new site required some land to be added to the shoreline, and the state legislature appropriated funds to assist with that project.⁵⁰⁵ It also required the cooperation of the Illinois Central Railroad in turning over some of its land south of the park, which the railroad readily agreed to do.⁵⁰⁶ The museum was finally completed in 1921.⁵⁰⁷

F. Ward's Other Actions

While the high-stakes duel between Ward and the civic elite was playing itself out in the Illinois Supreme Court, Ward continued to perform his accustomed role of park watchdog. The results were mixed, partly on account of his aggressive efforts to expand the scope of the public dedication. Ward sought and failed to obtain an injunction against the construction of a trolley line in the right-of-way of Michigan Avenue.⁵⁰⁸ He also sought and failed to enjoin the construction of a clubhouse for a yacht club in the harbor just east of the border of Grant Park.⁵⁰⁹

Ward was more successful in blocking the erection of a tent to be used for a major speech by William Jennings Bryan, who was touring the country in 1900 as the Democratic Party candidate for President.⁵¹⁰ When Ward saw the tent going up in the park, he called the city corporation counsel to protest.⁵¹¹ The Democrats reluctantly agreed to forgo the tent and held the event in the open air.⁵¹² Ward's action was viewed as politically motivated, and Senator James K. Jones, chairman of the Democratic National Committee, urged Democrats to boycott Montgomery Ward & Co. in protest.⁵¹³ Ward engaged in damage control by issuing a statement in which he claimed—implausibly—that he had not known the purpose of the tent, and said he was merely “guilty of trying to give the people of Chicago a free park.”⁵¹⁴

The next year, Ward called on the Superintendent of Streets to demand that the federal government desist from building a fence outside the

⁵⁰³ S. Park Comm'rs, Meeting Minutes 142 (Mar. 22, 1911).

⁵⁰⁴ 1911 Ill. Laws 435.

⁵⁰⁵ *House Gives Aid to Field Museum*, CHI. TRIB., Aug. 9, 1912, at 7.

⁵⁰⁶ STOVER, *supra* note 60, at 298–99.

⁵⁰⁷ *Timeline*, FIELD MUSEUM, <http://fieldmuseum.org/about/timeline> (last visited Aug. 23, 2011).

⁵⁰⁸ *Chi. City Ry. v. Montgomery Ward & Co.*, 76 Ill. App. 536 (1898); *see infra* notes 544–51 and accompanying text.

⁵⁰⁹ *See infra* notes 552–59 and accompanying text.

⁵¹⁰ *Ward Stops Bryan Tent*, CHI. TRIB., Nov. 1, 1900, at 2.

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Jones Cries “Boycott Ward,”* CHI. TRIB., Nov. 2, 1900, at 4.

⁵¹⁴ A. Montgomery Ward, *supra* note 341.

temporary post office.⁵¹⁵ The mail wagons cutting through the park had been stirring up dust clouds, creating a problem for the Art Institute. The government had offered to build a fence to block the dust. Ward saw the fence being erected and immediately objected.⁵¹⁶ The fencing project stopped.⁵¹⁷

While the *Ward IV* case was pending, the vice president of the Illinois Central Railroad Company requested permission to build a depot at Monroe Street in Grant Park.⁵¹⁸ George Merrick promptly wrote letters to the SPC and the Illinois Central stating that such a depot would be illegal.⁵¹⁹ Needless to say, the depot was never built.

These actions suggest strongly that Ward was not motivated by any particular animus toward Marshall Field and his museum, as has sometimes been suggested.⁵²⁰ Indeed, Ward's early financial support for Field's initiative, and his offers to settle with the Crerar Library and the museum on terms that would permit those structures to be built in the park, indicate that he was relatively sympathetic to the construction of monumental buildings in the park. At the same time, Ward's actions after 1900 suggest a growing imperiousness as he came to assume that he had unilateral authority to approve or disapprove practically any construction activity between Michigan Avenue and the centerline of the lake. His willingness to pay the legal bills necessary to back up his judgments meant that this assumption closely corresponded with reality.

By 1912, Montgomery Ward & Co. had outgrown the facility on Michigan Avenue and moved its operations to Chicago Avenue, north of the city center. Ward, who was by then the sole owner of the Michigan Avenue property,⁵²¹ quickly sold it in three different transactions.⁵²² In

⁵¹⁵ *City Prevents Uncle Sam from Building a Fence*, CHI. TRIB., Oct. 25, 1901, at 3.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ S. Park Comm'rs, Meeting Minutes 30 (Dec. 14, 1910).

⁵¹⁹ *See id.* at 30–31.

⁵²⁰ *See WILLE, supra* note 4, at 78. Ward and Field sometimes socialized, and they were among the founders of the Midlothian Country Club. *See Some Historic Facts About Midlothian Country Club*, MIDLOTHIAN COUNTRY CLUB WKLY. NEWS BULL. (Midlothian Country Club, Midlothian, Ill.), Sept. 15, 1983 (on file with Chicago History Museum).

⁵²¹ By 1892, Thorne's five sons had joined the business and had assumed management of the company. HISTORY & PROGRESS, *supra* note 270, at 18–19. In 1893, Ward sold his controlling interest in the company to Thorne. LATHAM, *supra* note 270, at 32.

⁵²² The first transaction was in August 1912 when Ward sold the lot along Michigan Avenue midway between Washington and Madison Streets to attorney Harry C. Levinson for \$1,295,000. *Lake "Watchdog" Sells Big Tower*, CHI. TRIB., Jan. 14, 1913, at 1. The second sale occurred in September 1912, when Ward sold the property on the corner of Michigan Avenue and Washington Street to architect Jarvis Hunt for \$1.1 million. *Lake "Watchdog" Sells New Site; Power Passing*, CHI. TRIB., Sept. 14, 1912, at 1. The last piece of property, on the corner of Michigan Avenue and Madison Street, was sold to a syndicate in January 1913 for \$1.3 million. *Lake "Watchdog" Sells Big Tower, supra*. Figure 15 in Part IV.D of this Article reflects the basic location of the buildings.

February 1913, Montgomery Ward & Co. went public.⁵²³ Later that year, Ward broke his hip while at his winter home in Pasadena, California. He returned to Chicago to convalesce, but died of pneumonia on December 7, 1913.⁵²⁴ Although it was thought that Ward would make a provision in his will for the ongoing fight against buildings in Grant Park,⁵²⁵ he left nearly all of his money to his wife and daughter.⁵²⁶

G. Ward's Motives

What are we to make of Ward's motives for his remarkable crusade to keep Grant Park free of offending structures? The first thing to note is that Ward's record as "watchdog" was largely consistent with his interests as an investor in commercial real estate. Ward's actions to protect the lakefront began when he acquired significant Michigan Avenue property, and ended when he sold that property. His effort to protect the park intensified after 1893 when he acquired Thorne's interest in the property and became its sole owner. From that time until he sold it, the Michigan Avenue property was Ward's largest asset.⁵²⁷

Ward's enforcement activity was also selective in a way that reflected his interests as a property owner. He did not challenge the Art Institute or the Public Library, he consented to the Democratic Party wigwam and the temporary post office—and he was prepared to consent to both the Crerar Library, if it would be located in the south park, and the Field Museum, if the SPC would agree that there would be no more buildings. He opposed loading platforms, storage sheds, garbage, circuses, bicycle tracks, tents for political rallies, armories, and railroad depots. His guiding principle was not big versus little—he sometimes opposed small structures (storage sheds, bicycle tracks, fences) and sometimes favored large ones (the Art Institute, the Public Library, the post office). Nor was it permanent versus temporary—sometimes he opposed temporary structures (circuses, tents for political rallies) and sometimes he favored permanent ones (the Public Library, the Art Institute).

Overall, Ward appeared to be guided by a sure sense of how different projects would affect the market value of real estate on Michigan Avenue. Nuisances, clutter, unsightly temporary platforms, fences, and—especially—noisy crowds would likely impair real estate values on

⁵²³ See *\$5,000,000 Montgomery Ward & Co., Inc.*, CHI. TRIB., Feb. 17, 1913, at 14 (advertising public stock offering).

⁵²⁴ LATHAM, *supra* note 270, at 51; *Death Takes Ward, Lake "Watchdog," Following Fall*, CHI. TRIB., Dec. 8, 1913, at 1.

⁵²⁵ *Death Takes Ward*, *supra* note 524.

⁵²⁶ *Ward's \$5,000,000 Goes to Family*, CHI. TRIB., Dec. 24, 1913, at 3. See also Last Will and Testament of A. Montgomery Ward (on file with Chicago History Museum).

⁵²⁷ Ward sold the property for \$3.7 million in 1912–13, see *supra* note 522, and left an estate of \$5 million when he died in 1913. See *Ward's \$5,000,000 Goes to Family*, *supra* note 526.

Michigan Avenue. Stately and decorous structures such as the Public Library and the Art Institute would not. Ward's opposition to the Crerar Library and the Field Museum are arguably inconsistent with this generalization, since it is plausible that these structures—like the Public Library and the Art Institute—would have enhanced real estate values on Michigan Avenue.⁵²⁸ But this ignores Ward's apparent willingness to settle with the proponents of these two structures if he could put them where he wanted them to go and could preserve his control over everything else.

Ward's consent to construction of the temporary post office is particularly revealing. This ungainly building would impair the view of the lake and the flow of air and light enjoyed by Ward's facility immediately opposite on the west side of Michigan Avenue. But by 1895, Montgomery Ward & Co. had become the single largest customer of the U.S. Postal Service.⁵²⁹ A well-functioning postal system was an imperative for such an organization, and it was clearly in Ward's financial interest to consent to the temporary post office.⁵³⁰

FIGURE 16: TEMPORARY POST OFFICE IN GRANT PARK AT WASHINGTON STREET CIRCA 1900⁵³¹



Still, although Ward's financial interests undoubtedly motivated and shaped his behavior, they do not fully account for his remarkable zeal in enforcing the public dedication. For one thing, he spent an estimated \$50,000 on litigation during his period of ownership⁵³²—roughly \$1.1 million in today's dollars and far more than any previous or

⁵²⁸ In *Daggett*, the court heard extensive testimony that the Art Institute would likely increase the value of Sarah Daggett's property immediately across the street. *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79, 87 (Cook County, Ill., Cir. Ct. 1892).

⁵²⁹ HOGE, *supra* note 282, at 28.

⁵³⁰ It is true that Merrick filed suit on behalf of Ward challenging an expansion of the temporary post office in 1900. *See Ward v. Cong. Constr. Co.*, 99 F. 598 (7th Cir. 1900). But this legal action may have been motivated more by Merrick's concern about defeating the estoppel argument advanced by the City in *Ward I* than by Ward's hostility to having a post office located opposite his property.

⁵³¹ On file with Chicago History Museum ICHi-32436.

⁵³² Dunham, *supra* note 266, at 19.

subsequent owner was willing to spend.⁵³³ Ward himself suggested that the expenditure was not economically justified.⁵³⁴ His litigation activity also took on a fanatical quality, especially as the years went on. Preventing the Bryan campaign from putting up a tent for a one-day rally was hardly in the interests of Montgomery Ward & Co., particularly given the call for a boycott that it elicited. And it is hard to see how Ward's property values would be affected by the construction of a yacht club in the lake.

One hypothesis is that Ward was driven by populist sympathies.⁵³⁵ He himself claimed on several occasions that he did it for the "poor people" rather than the "millionaires."⁵³⁶ Ward regarded himself as a man of the people. He started life as a manual laborer, strongly empathized with struggling farm families, made many charitable donations to the poor, and was affiliated for many years with the Granger movement. And the public statements issued in his name or on his behalf, and seeking to explain his actions, consistently emphasized populist themes.

But the pattern of Ward's actions does not support the thesis that he was seeking to protect the interests of the masses. A number of the projects that he blocked had been expressly approved by the Chicago City Council and the Illinois General Assembly, both composed of elected representatives of the people. One, the Field Museum, not only was supported by representative bodies but also received an overwhelming affirmative vote in a public tax referendum.⁵³⁷ These are better measures of popular opinion than Ward's views about the wants and needs of the people.⁵³⁸ Further, Ward showed striking hostility toward popular entertainment in the park, bringing multiple actions to block the Adam Forepaugh Circus and shutting down a bicycle track, just as an earlier generation of owners had opposed toboggan slides and professional baseball games. It is highly doubtful that the "poor people" approved of these actions.

⁵³³ This inflation estimate is based upon the Bureau of Labor Statistics CPI Calculator. *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 23, 2011). For a calculator that provides seven measurements of the relative value of U.S. dollars, see *Seven Ways To Compute the Relative Value of a U.S. Dollar Amount—1774 to Present*, MEASURINGWORTH.COM, <http://www.measuringworth.com/uscompare> (last visited Aug. 23, 2011). This calculator provides a range of \$848,000 to \$18.7 million when converting \$50,000 at Ward's death in 1913 to present value in 2011. *Id.*

⁵³⁴ *Moving To Block Victory of Ward*, *supra* note 458.

⁵³⁵ See WILLE, *supra* note 4, at 71.

⁵³⁶ See, e.g., *Moving To Block Victory of Ward*, *supra* note 458; *Ward Awaits Other Consents*, CHI. TRIB., May 7, 1901, at 3.

⁵³⁷ See *supra* note 426 and accompanying text.

⁵³⁸ Ward could afford to defy local public opinion because his wealth did not depend on what people in Chicago thought about him. His market was rural and small-town America. Thus, in contrast to Marshall Field, for example, he could incur the displeasure of Chicagoans without any significant personal hardship to his firm or its profits.

A somewhat better hypothesis is that Ward was a naturalist or environmentalist ahead of his time. In effect, Ward wanted to preserve the park in an unspoiled condition free of artificial encumbrances. Ward made some statements consistent with this hypothesis. In a short interview with a reporter in 1893, Ward stated he had been impressed on a recent trip to Europe by the public parks that had been assembled in many cities there.⁵³⁹ The reporter quoted Ward as urging that the armories and other clutter in Lake Park be removed, “and in [their] place give us beautiful fountains, pleasant walks and green lawns where tired humanity may disport at will, unhampered by any restriction whatever.”⁵⁴⁰

The evidence for this hypothesis is somewhat stronger than for the claim that Ward was a populist. Ward often expressed distaste for garbage, refuse, and litter in the park.⁵⁴¹ And his opposition to gatherings in the park for circuses, bicycle races, and political rallies might reflect an austere naturalist vision of the proper uses of a park, akin to what many proponents of national parks and wilderness areas often express today. Again, however, the data do not fully conform to the thesis. Ward was clearly more sympathetic to the erection of monumental public buildings such as the Public Library and the Art Institute than he was to lesser intrusions such as circuses, bicycle tracks, and political rallies. The temporary post office building was about the most unnatural addition to the park imaginable, but it had Ward’s consent.

Yet another interpretation is that Ward had a strong antipathy to disorder. His retailing empire was characterized by its precise organization and attention to detail.⁵⁴² Ward was first drawn to intervene in the lakefront by his disgust at seeing garbage piled in the park for loading onto trains. Once he assumed the role of “watchdog,” he consistently opposed any activity that would generate nuisances or involved the gathering of large and boisterous crowds, such as circuses. The old armories demolished in 1895 were associated in his mind with raucous prizefights and dogfights. In contrast, large, well-ordered institutions such as public libraries and the post office were less likely to incur Ward’s displeasure.

To use the modern vernacular, Ward was something of a control freak. He had the financial resources and, thanks to the public dedication doctrine, the legal power to attempt to impose his vision of a more orderly world on the space known as Grant Park. He did not fully succeed, of course, for large public spaces in major urban centers are inherently disorderly—they

⁵³⁹ *To Be a Fine Park*, *supra* note 332.

⁵⁴⁰ *Id.* (internal quotation marks omitted) (source for this particular portion of article as attributed by the American Heritage Center in Laramie, Wyoming).

⁵⁴¹ See *supra* notes 4, 306–09 and accompanying text.

⁵⁴² See Boorstin, *supra* note 264, at 147–78.

are subject to the vagaries and whims of the random clusters of people who venture forth into them.⁵⁴³

Whatever his private motives, Ward's persistence and willingness to spend large sums of money on litigation left a body of law—in particular, four Illinois Supreme Court precedents—that would protect Grant Park from major intrusions for more than a century. The City of Chicago would look very different today but for Aaron Montgomery Ward.

V. THE LIMITS OF THE PUBLIC DEDICATION DOCTRINE

The *Ward* precedents were strong stuff—no buildings in Grant Park, period—and it is not surprising that courts were soon asked to prescribe limits to this understanding in terms of the territory covered by the public dedication and the type of intrusions prohibited. The process of identifying limits began while Ward was still fully engaged in the role of watchdog. It continues to this day.

A. Territorial Limits of the Doctrine

Ward was responsible for defining the territorial boundary of the Grant Park public dedication—north, south, east, and west. *Ward I* established that the doctrine applied to the original fractional section 10, from Madison Street on the south to Randolph Street on the north. *Ward II* extended the doctrine to landfill east of the original area encompassed by Lake Park. *Ward III* established that the doctrine applied in the original fractional section 15, from Madison Street on the north to Park Row (later to 12th Street) on the south, and to landfill east of this original area. Ward also launched two other battles that further delineated the eastern and western boundaries of the dedication.

In March 1898, the Chicago City Railway Company started construction on Michigan Avenue for an electric trolley.⁵⁴⁴ The company planned to put poles along Michigan Avenue from which to hang trolley wires.⁵⁴⁵ Ward secured a temporary injunction against the erection of poles

⁵⁴³ There is evidence that Ward was rather disengaged from the litigation, especially after 1893 when he turned over control of the company to the Thornes. During this period, Ward spent significant time away from Chicago at his homes in Oconomowoc, Wisconsin, and Pasadena, California. For example, he was absent from the State during the three weeks of evidentiary hearings in *Ward I*. See Transcript of Record, *supra* note 4, at 341 (statement of Thorne and Ward). At least one reporter, who submitted written questions to Ward only to have the answers quickly clarified by Hanecy, was driven to ask “whether Mr. Ward, or his attorney, Elbridge Hanecy, is the author of the opposition to improvements in Grant park.” *Ward Wavering on Museum Plan*, CHI. TRIB., Nov. 23, 1908, at 1. Nevertheless, although Ward's attorneys—especially Merrick—made something of a career out of the Grant Park litigation, there is no evidence that Ward ever disapproved of their efforts or threatened to stop paying the legal bills. Something about being the watchdog of the lakefront was deeply gratifying to him, and he persisted in that role until he sold his last interest in the Michigan Avenue property.

⁵⁴⁴ *Bar for the Wires*, CHI. TRIB., Mar. 31, 1898, at 10.

⁵⁴⁵ *Id.*

and wires within the right-of-way of Michigan Avenue, based on Merrick's argument that *Ward I* covered the area to the west line of Michigan Avenue.⁵⁴⁶

On appeal, the Illinois Appellate Court dissolved the injunction, holding that Ward had not pleaded sufficient facts to establish that the ninety feet of Michigan Avenue as constructed was subject to a public dedication.⁵⁴⁷ The court pointedly noted that Merrick had failed to include the original map of fractional section 10 in the record. More pertinently, the court added that even if the dedication did cover Michigan Avenue, the dedication was to establish a "public ground," and "we see nothing inconsistent, so far as appears from any allegations of fact in the bill, with such public ground being used for street purposes, and not as a park."⁵⁴⁸ The case was remanded to the trial court, where Judge Brentano continued the injunction to allow Ward to file an amended bill of complaint.⁵⁴⁹ After that, the dispute disappeared from the newspapers, presumably because it was settled or dropped. The practical effect of the ruling seems to have been to fix the western boundary of the dedication at the eastern—rather than the western—edge of Michigan Avenue.⁵⁵⁰

The trolley case also marked one of the last attempts to argue that the public dedication was an affirmative command to use the lakefront for park purposes, rather than a negative restriction on buildings. Merrick had no choice but to make "park purposes" the centerpiece of his argument, since poles and wires are obviously not "buildings." This probably explains why he did not introduce a copy of the original map of section 10—which explicitly referred to "buildings"—into the record. In any event, the court saw through the ploy. The decision, which would soon be reinforced by *Ward III*, effectively marked the end of the park-purposes argument.⁵⁵¹

Another protracted battle launched by Ward would even more clearly delineate the *eastern* boundary of the dedication. In 1899, the federal government granted the Columbia Yacht Club permission to build a permanent two-story structure at the foot of Randolph Street, just outside the harbor line.⁵⁵² At the time, several hundred feet of water separated the eastern edge of Lake Park and the harbor line. The South Park

⁵⁴⁶ *Ban on Loop To Stand*, CHI. TRIB., Apr. 14, 1898, at 10.

⁵⁴⁷ *Chi. City Ry. v. Montgomery Ward & Co.*, 76 Ill. App. 536 (1898).

⁵⁴⁸ *Id.* at 544.

⁵⁴⁹ *Lifts Ban on Trolley*, CHI. TRIB., May 27, 1898, at 4.

⁵⁵⁰ See, e.g., *Mich. Boulevard Bldg. Co. v. Chi. Park Dist.*, 412 Ill. 350, 357, 106 N.E.2d 359, 364 (1952) (describing the boundary of Grant Park, and by implication the dedication, as "the east line of Michigan Avenue"); *Stevens Hotel Co. v. Art Inst. of Chi.*, 260 Ill. App. 555, 557 (1931) (describing boundary of Grant Park as ninety feet east of the west line of Michigan Avenue).

⁵⁵¹ See *supra* notes 441–61 and accompanying text.

⁵⁵² *New Yacht Club House*, CHI. TRIB., Feb. 3, 1899, at 4. The Columbia Yacht Club had been operating out of a shed atop a barge. *Id.*

Commissioners intended to fill the park to the harbor line, and the yacht club building would eventually be situated just off the shore.⁵⁵³ The club's officials stated that since the club would be located in waters outside the harbor line, it would be outside the jurisdiction of the SPC, the City, and the State.⁵⁵⁴

On August 16, 1899, Ward filed a bill to enjoin construction of the new clubhouse, alleging that the structure violated the restriction on buildings in the park.⁵⁵⁵ The yacht club responded that Ward had no standing to bring the suit, because the structure was not located in the park. It argued that Ward was asserting a type of riparian right associated with ownership of the park.⁵⁵⁶ That right belonged to the people at large, and could be vindicated only by the State's Attorney, not by a private citizen.⁵⁵⁷

In December, Judge Kavanaugh declined to grant an injunction, ruling that Ward lacked standing.⁵⁵⁸ The judge noted that the City and the Illinois Central both held property that lay between Ward's property and the clubhouse, eliminating any rights that he might claim based on riparian ownership. A newspaper account of the ruling indicates that Ward intended to appeal,⁵⁵⁹ but it appears that he did not.

This was only the beginning of the controversy over the yacht clubs. In 1901, the SPC granted a second club, the Chicago Yacht Club, permission to build a clubhouse at the foot of Monroe Street, also just outside the harbor line.⁵⁶⁰ Clarence W. Marks, who had sold Ward and Thorne some of the property that they occupied on Michigan Avenue between Washington and Madison Streets,⁵⁶¹ filed an action for an injunction against both the Chicago and Columbia Yacht Clubs.⁵⁶² The complaint sought to stop the Chicago Yacht Club from building its clubhouse and to compel the Columbia Yacht Club, which had nearly completed its building, to tear it down.⁵⁶³ Marks was represented by George Merrick, Ward's lawyer throughout the marathon litigation over buildings

⁵⁵³ Permission to fill the harbor came from an 1895 city ordinance. See Appellate Record at 63–64, *Chi. Yacht Club v. Marks*, 97 Ill. App. 406 (1901).

⁵⁵⁴ *New Yacht Club House*, *supra* note 552.

⁵⁵⁵ *Move Against Columbia Yacht Club*, CHI. TRIB., Aug. 17, 1899, at 4.

⁵⁵⁶ Ownership of riparian land often includes the right to an unobstructed view of the water as a matter of law. 1 WATERS AND WATER RIGHTS § 6.01(a)(3), at 6-52–6-53 (Robert E. Beck & Amy L. Kelley eds., 3d ed. LexisNexis/Matthew Bender 2010) (1967) (citing authority).

⁵⁵⁷ *Columbia Yacht Club's Defense*, CHI. TRIB., Aug. 29, 1899, at 4.

⁵⁵⁸ *Rules Against Ward & Co.*, CHI. TRIB., Dec. 19, 1899, at 7.

⁵⁵⁹ *Id.*

⁵⁶⁰ See *Defends Lake Front Too*, CHI. TRIB., May 22, 1901, at 9.

⁵⁶¹ Marks had previously consented to the erection of the Chicago Public Library in Dearborn Park. See *Owners of Lots Abutting on Dearborn Park*, *supra* note 86.

⁵⁶² *Defends Lake Front Too*, *supra* note 560.

⁵⁶³ *Id.*

in Grant Park.⁵⁶⁴ It is conceivable that Marks agreed to undertake the litigation at the urging of Ward, who was presumably barred by res judicata from challenging the Columbia Yacht Club structure.⁵⁶⁵

Marks acknowledged in his complaint that the yacht clubs were being constructed on submerged land that was technically outside the boundary of Lake Park as defined by the City's ordinance of 1895.⁵⁶⁶ But he insisted that this location was deliberately chosen to frustrate the rights of Michigan Avenue owners and reflected a conspiracy on the part of the clubs to evade the law.⁵⁶⁷

Marks initially had better luck than Ward, securing an ex parte injunction from Judge Hanecy, Merrick's former (and future) law partner.⁵⁶⁸ On appeal, however, the Illinois Appellate Court concluded that the public dedication doctrine stopped at the eastern border of Lake Park, wherever that might be located.⁵⁶⁹ One can detect in the opinion significant skepticism about the bona fides of Marks's contentions. There was considerable distance between the west side of Michigan Avenue and the yacht clubhouses, and the structures were not large. The court observed that "the view from appellee's premises at the corner of Washington street and Michigan boulevard can scarcely be said, from the allegation of the facts of the bill, to be obstructed by a building in the lake opposite the foot of Monroe street."⁵⁷⁰

The first battle over the yacht clubs was concluded, but conflict would resume again in 1925 after the harbor line, and the park, were extended farther east into Lake Michigan to facilitate the construction of Lake Shore Drive. Expansion of the park required relocation of the yacht clubs, and Michigan Avenue property owners, fortified now by four *Ward* decisions rather than just one, promptly sought to enjoin reconstruction of the clubs.

⁵⁶⁴ *Id.*

⁵⁶⁵ There is no direct evidence of this. After the Chicago Yacht Club's motion to dissolve the temporary injunction was denied, Merrick stated to the press, "Mr. Ward is in Europe and I have no instructions to begin any new suits." *Have Right to View of Lake*, CHI. TRIB., June 21, 1901, at 1 (internal quotation marks omitted).

After the appellate court overturned the injunction, the case went to the Illinois Supreme Court on the question of damages under the bond that Marks had posted to secure the injunction. *See Marks v. Columbia Yacht Club*, 219 Ill. 417, 76 N.E. 582 (1905). The court awarded the Chicago Yacht Club \$1200 and the Columbia Yacht Club \$700 in damages. *Id.* at 419, 76 N.E. at 582. Marks was represented by Stein, Mayer, Stein & Hume, not Merrick, in this phase of the dispute. *Id.*

⁵⁶⁶ *See supra* note 97 and accompanying text.

⁵⁶⁷ Appellate Record, *supra* note 553, at 12–15.

⁵⁶⁸ *Defends Lake Front Too*, *supra* note 560.

⁵⁶⁹ *Chi. Yacht Club v. Marks*, 97 Ill. App. 406, 411–12 (1901).

⁵⁷⁰ *Id.* at 413. Monroe Street is two blocks south of Washington Street.

In two separate decisions, the Illinois Supreme Court rejected these renewed challenges to the clubs.⁵⁷¹ One of the actions was brought by the owners of the Stevens Hotel, which would become the Conrad Hilton Hotel (and is today the Hilton Chicago).⁵⁷² Although *Marks* was not cited, the reasoning of the Illinois Supreme Court was equally formalistic: the proposed yacht club buildings were outside the legal boundary of the park, and the public dedication doctrine applied only to the park.⁵⁷³

One puzzle presented by these cases is why the yacht clubs triggered such persistent litigation activity from Michigan Avenue landowners. One can understand why owners of properties on Michigan Avenue would be upset by baseball stadiums, armories, depots, and even circus tents blocking their view of the lake and bringing congestion, noise, and litter to the park across the street. These structures and their associated activity would depress the market value of property on the west side of Michigan Avenue, which would be a reason for a property owner to sue. Yet it is difficult, at least at this distance in time, to understand how the existence of the yacht clubs posed any threat to Michigan Avenue land values. The club buildings were relatively small and not visible from street level on Michigan Avenue. Indeed, from the perspective of modern sensibilities, the clubs' neat rows of sailboats bobbing in the harbor during warm weather would add to, rather than detract from, the aesthetics of the vista. It is also hard to imagine that yacht clubs would inject significant traffic or uncouth crowds into the park, at least to a degree that might affect property values.

We can only speculate that the owners feared that the yacht clubs would become a precedent that would allow more extensive construction in the water just outside the official boundary of the park. This was not an idle threat. Daniel Burnham's Plan of Chicago prominently featured a wide strip of park in the lake separated from the shore by lagoons, as well as multiple artificial islands farther off shore.⁵⁷⁴ And at one juncture during the marathon fight over the Field Museum, state legislators proposed to construct the museum on an island just off the edge of the park.⁵⁷⁵ Of

⁵⁷¹ *McCormick v. Chi. Yacht Club*, 331 Ill. 514, 163 N.E. 418 (1928); *Stevens Hotel Co. v. Chi. Yacht Club*, 339 Ill. 463, 171 N.E. 550 (1930). The McCormick who sued the yacht clubs was not Colonel Robert R. McCormick, the publisher of the *Chicago Tribune*, but Robert H. McCormick. The latter, ironically, was among other things a member of the New York Yacht Club. *THE BOOK OF CHICAGOANS: A BIOGRAPHICAL DICTIONARY OF LEADING LIVING MEN OF THE CITY OF CHICAGO* 438 (Albert Nelson Marquis ed., 1911).

⁵⁷² The Stevens Hotel was managed by the father of John Paul Stevens, future U.S. Supreme Court Justice. Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1. The Stevens Hotel struggled throughout the Great Depression, leading to eventual criminal charges of embezzlement against Justice Stevens's father, uncle, and grandfather; their convictions were overturned by the Illinois Supreme Court. See *People v. Stevens*, 358 Ill. 391, 193 N.E. 154 (1934).

⁵⁷³ See, e.g., *Stevens Hotel*, 339 Ill. at 468, 171 N.E. at 552.

⁵⁷⁴ BURNHAM & BENNETT, *supra* note 93, at 50–53.

⁵⁷⁵ *Plan an Atlantis of Field Museum*, CHI. TRIB., Jan. 5, 1910, at 1.

course, whether or not their apprehensions were warranted, the owners, by suing and losing, enhanced the very risk they feared.

Whatever may have motivated the owners to challenge the yacht clubs, there is little doubt why the Illinois courts rejected these challenges. The Illinois Supreme Court, in the *McCormick* decision, quoted paragraphs from the stipulation of facts reciting the many public benefits associated with the clubs. The clubs provided free wharfage for the U.S. Naval Reserve, free nautical training for sailors in World War I, and free sailing lessons for Boy Scouts; moreover, the wharves of the clubhouse would afford the “only present means whereby vessels and other craft may safely land passengers along the lake front.”⁵⁷⁶ On the other hand, the court seemed skeptical of the property owners’ claims of injury. One of the plaintiffs, the Stevens Hotel, averred that it had designed its enormous 3000-room hotel “so that as large a number of rooms as possible should front on Grant Park and guests occupying the rooms would have an unobstructed view over the park to the lake.”⁵⁷⁷ But the court noted that the reconstructed yacht club building would be three-quarters of a mile away from the hotel, in a northeasterly direction, “and the proposed club house will not be visible to a person walking along Michigan avenue from any point thereof or any part of the hotel building below the second story.”⁵⁷⁸ Although the court did not rest its decisions on a balancing of the equities, it is not hard to perceive that the court regarded the public benefits from the yacht clubs as exceeding any detriment to the property owners.

B. Defining “Building”

Just as the trolley and yacht club cases defined the territorial limits of the Grant Park public dedication, other controversies helped define what sorts of structures would be regarded as “buildings” prohibited by the public dedication. In contrast to questions about territorial limits, where bright-line boundaries have prevailed, the definition of “building” frequently has been influenced by the purposes of the dedication. To be sure, the ordinary meaning of “building”—a structure enclosed by walls and a roof, large enough to accommodate some form of human activity⁵⁷⁹—has

⁵⁷⁶ *McCormick*, 331 Ill. at 519–20, 163 N.E. at 419–20.

⁵⁷⁷ *Stevens Hotel*, 339 Ill. at 465–66, 171 N.E. at 551.

⁵⁷⁸ *Id.* at 468, 171 N.E. at 552.

⁵⁷⁹ A dictionary in use at the time the dedications were made states that “building” is “[a] fabric or edifice constructed for use or convenience, as a house.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 111 (New York, S. Converse 3d ed. 1830). Shortly after the *Ward* cases, “building” was defined as

[t]hat which is built; . . . As now generally used, a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for use as a dwelling, storehouse, factory, shelter for beasts, or some other useful purpose. *Building* in this sense does not include a mere wall, fence, monument, hoarding, or similar structure, though designed for permanent use where it stands; nor a steamboat, ship, or other vessel of navigation.

established the core meaning of this concept. But in marginal cases the courts, at least on occasion, have turned to purposive interpretation.

The many decisions and controversies up to 1910 established the outer limits of the meaning of the term "building." At one end of the spectrum, decisions by the Illinois Supreme Court established that libraries, museums, armories, post offices, and depots were buildings, and the court in dictum added that power houses and stables would be buildings, too.⁵⁸⁰ The decree in *Ward I* also established that loading platforms and storage sheds were regarded as buildings. Local precedent had held that a baseball stadium was a building.⁵⁸¹ At the other end of the spectrum, it appears that no one has ever argued that bridges such as those spanning the Illinois Central tracks are buildings, or that statues and fountains in the park are buildings. And the court has opined in dictum that storm shelters, band stands, lavatories, and toilets would not be buildings.⁵⁸²

As to whether temporary as opposed to permanent structures qualify as buildings, the local precedents are mixed. Ward was clearly of the view that tents and wigwams count as buildings, and his aggressive litigation achieved some success in vindicating this viewpoint. But a number of local decisions went the other way, both before and after Ward's reign as watchdog. The practice today is to allow tents to be erected during various festivals held in the park.⁵⁸³

The most extensive consideration of the definitional issue occurred in a decision of the Illinois Supreme Court in 1952, ruling on a challenge to the construction of the first of four parking garages under the park.⁵⁸⁴ Although the project in question entailed significant disruption of the north park and caused the destruction of the well-known peristyle at Randolph Street and Michigan Avenue, the court held that it did not violate the public dedication.⁵⁸⁵ The court noted that once construction was finished, nearly all of the parking garage would be underground, except for entrances and exits and several five-foot-high air vents and intakes, which would be disguised with shrubbery.

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 288 (2d ed. 1913). A modern dictionary defines "building" as "a relatively permanent enclosed construction over a plot of land, having a roof and usually windows and often more than one level, used for any of a wide variety of activities, as living, entertaining, or manufacturing" or as "anything built or constructed." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 274 (2d ed. 2001).

⁵⁸⁰ *Ward v. Field Museum of Natural History*, 241 Ill. 496, 510, 89 N.E. 731, 736 (1909).

⁵⁸¹ See *supra* notes 237–50 and accompanying text.

⁵⁸² *Ward*, 241 Ill. at 510, 89 N.E. at 736.

⁵⁸³ See, e.g., Kathy Bergen, *Event Adds \$12 Million for Olympics Bid*, CHI. TRIB., July 15, 2008, § 3 (Business), at 3.

⁵⁸⁴ *Mich. Boulevard Bldg. Co. v. Chi. Park Dist. (Parking Garage Case)*, 412 Ill. 350, 352, 106 N.E.2d 359, 361 (1952).

⁵⁸⁵ *Id.* at 364, 106 N.E.2d at 367.

In considering whether the parking garage project violated the restriction against buildings, the court emphasized the purposes of the dedication. The intention of the dedication, the court said, “was to keep the public tracts free of buildings so that there would be unobstructed view of Lake Michigan” and to make “lots abutting on such tracts more desirable.”⁵⁸⁶ Significantly, although the parties had stipulated that the air vents and intakes were “structures and not buildings,” the court indicated that it did not regard this as determinative: “[I]t is drawing too fine a line of distinction to say that the erection of structures generally would not be in violation of the spirit of the restrictions in the original dedications.”⁵⁸⁷ The vents and intakes did not violate the dedication because they occupied only an “infinitesimal portion” of the whole park, they would be concealed “with shrubbery so that they will not disfigure” the park, and they would “not obstruct the view of any tenant of the plaintiff or any tenant of other abutting property.”⁵⁸⁸

The decision strongly implied that in borderline cases, whether a particular structure violates the dedication should be determined by asking whether it would interfere with the “right to view, light and air” sought to be protected by the dedication.⁵⁸⁹ In other words, at least in close cases, the purpose of the dedication should be considered. The decision eventually led to the construction of three more underground garages, making Grant Park—below the surface—one of the largest parking facilities in the world.⁵⁹⁰

Under the purposive test deployed in the *Parking Garage Case*, many of the structures later erected in Millennium Park would have to be regarded as buildings. Indeed, Millennium Park includes several structures that would be regarded as buildings under the dictionary definition of the term, including the Harris Theater, the Exelon Pavilion, and the McDonald’s Cycle Center or bicycle station.⁵⁹¹ For this reason, the promoters of Millennium Park eventually concluded that they needed the consent of abutting landowners to circumvent the *Ward* precedents.⁵⁹² But even without regard to these structures, the Jay Pritzker Pavilion—though perhaps literally a “band stand” and thus under the dictum in *Ward III* not a building—is so massive that it completely obscures the views toward the lake from Washington Street (see Figure 17). Under the purposive interpretation of the *Parking Garage Case*, it should be deemed to be a building. The polished bean-shaped “Cloud Gate” weighs 110 tons, is

⁵⁸⁶ *Id.* at 361, 106 N.E.2d at 365.

⁵⁸⁷ *Id.* at 362, 106 N.E.2d at 366.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.* at 363, 106 N.E.2d at 366.

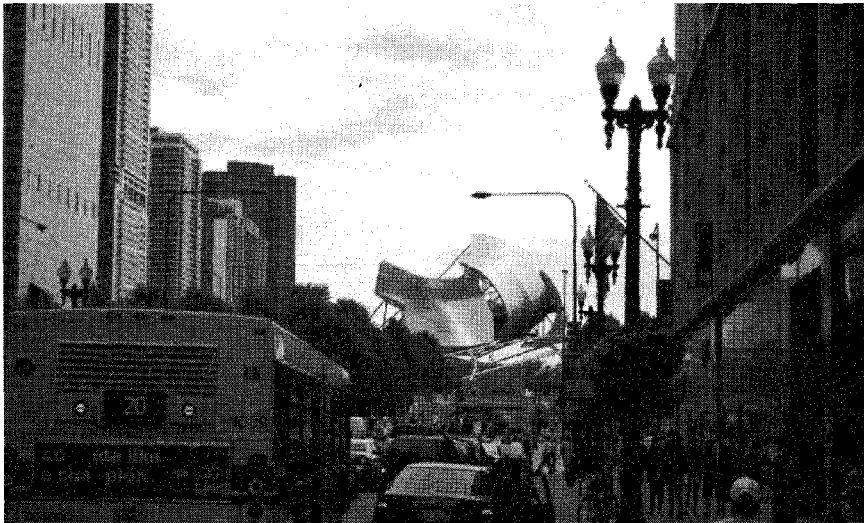
⁵⁹⁰ See *supra* note 116 (listing the underground garages, including sizes and dates of construction).

⁵⁹¹ See GILFOYLE, *supra* note 7, at 251–60, 320–23.

⁵⁹² *Id.* at 141–43.

sixty-six-feet long, and stands thirty-three-feet high.⁵⁹³ And the Crown Fountain consists of two towers twenty-three-feet wide, sixteen-feet thick, and fifty-feet tall.⁵⁹⁴ From a purposive perspective, these monuments could also be challenged as obstructing view, light, and air for abutting property owners.

FIGURE 17: VIEW LOOKING EAST FROM WASHINGTON STREET TOWARD LAKE MICHIGAN AND THE PRITZKER PAVILION (2010)



Another controversy that directly implicated the definition of “building” was the longstanding saga involving the Grant Park band shell. Free summer band concerts first appeared in the park in 1920, using a small band stand paid for by local business associations.⁵⁹⁵ In 1931, a much larger “temporary” band shell was constructed in south Grant Park. It proved to be immensely popular: by 1940 an estimated 3.5 million people enjoyed the free concerts every year.⁵⁹⁶ By the end of World War II, the band shell had fallen into disrepair; on one occasion, a grand piano reportedly fell through the stage.⁵⁹⁷

⁵⁹³ *Id.* at 261.

⁵⁹⁴ *Id.* at 277.

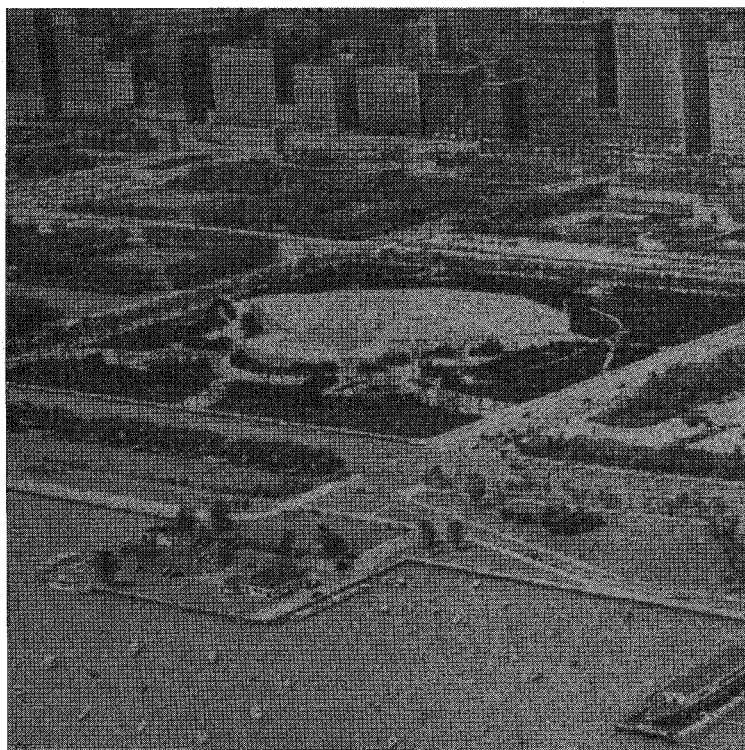
⁵⁹⁵ Cremin, *supra* note 26, at 308.

⁵⁹⁶ GILFOYLE, *supra* note 7, at 49.

⁵⁹⁷ *Id.* at 59.

The Park District embarked on a quest to identify a design and location for a more permanent structure. A long progression of proposals, many by famous architects, followed.⁵⁹⁸ The most ironic from the perspective of our story was a 1961 plan, jointly sponsored by the Park District and the A. Montgomery Ward Foundation, for a \$3 million band shell dedicated to the memory of Montgomery Ward (see Figure 18).⁵⁹⁹ Over about a thirty-year period, all proposals foundered when one or more property owners on Michigan Avenue either refused to consent or threatened to bring litigation invoking the *Ward* precedents to stop construction.⁶⁰⁰

FIGURE 18: RENDERING OF PROPOSED WARD MEMORIAL BAND SHELL⁶⁰¹



⁵⁹⁸ *Id.* at 50–63.

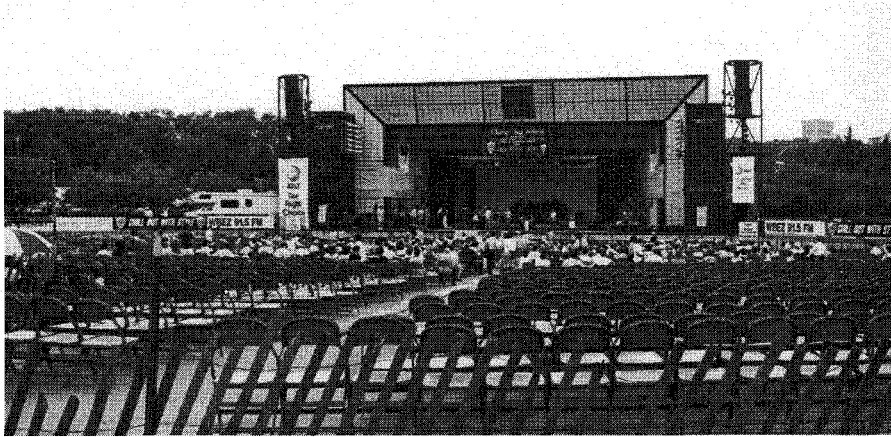
⁵⁹⁹ *Id.* at 53; see also Thomas Willis, *The Grant Park Amphitheater: Ward's Ghost Lives*, CHI. TRIB., July 2, 1972, at L3.

⁶⁰⁰ See, e.g., *Hope for Vote on Band Shell Nov. 3 Waning*, CHI. TRIB., Sept. 17, 1953, § 1, at 3; Bernard Judge, *Park District Asks To Move Band Shell*, CHI. TRIB., Aug. 13, 1969, § 1, at 20; *Portable Band Shell Is Urged*, CHI. TRIB., July 13, 1972, § 1, at 19; Stanley Ziemba, *Grant Park Concerts To Get New Home—Tent or Bandshell?*, CHI. TRIB., July 24, 1972, § 1, at 4; Paul Gapp, *Park District Seeks Bids on Disputed Band Shell*, CHI. TRIB., Mar. 18, 1977, at B1; Stanley Ziemba, *Band-shell Opponents To Fight Plan in Court*, CHI. TRIB., Oct. 17, 1977, at A1.

⁶⁰¹ On file with Chicago History Museum ICHI-62406. Note the yacht clubs in the foreground.

The impasse was broken, after a fashion, in 1977–78, when Edmund Kelly, superintendent of the Park District, announced that a new “demountable” band shell would be erected just east of Columbus Drive and the Art Institute.⁶⁰² No one sued to block its erection. When the summer concert season ended, Kelly said that the Park District would not waste its funds on “dismantling” the structure.⁶⁰³ Kelly in effect called the bluff of the Michigan Avenue owners. The Petrillo Music Shell remains a fixture of the park to this day, notwithstanding the construction of the \$60 million Pritzker Music Pavilion which was supposed to replace it.⁶⁰⁴

FIGURE 19: CONCERT AT THE PETRILLO BAND SHELL⁶⁰⁵



The thirty-year struggle to replace the decrepit Grant Park band shell tells us a great deal about the power and the pitfalls of the public dedication doctrine. The summer concerts attracted immense crowds,⁶⁰⁶ and it is not surprising that one or more landowners might object to the building of a structure that would encourage masses of humanity entering and leaving the park. What is more surprising is that owner opposition resulted in the collapse of repeated proposals for new band shells.⁶⁰⁷ In *Ward III*, the

⁶⁰² Robert Davis & Stanley Ziemba, *Compromise Reached on New Band Shell*, CHI. TRIB., Nov. 11, 1977, § 1, at 1.

⁶⁰³ *Bandshell Won't Be Removed*, CHI. TRIB., Oct. 25, 1978, § 2, at 2.

⁶⁰⁴ GILFOYLE, *supra* note 7, at 63–76.

⁶⁰⁵ Photograph by John McCarthy (Sept. 6, 1987) (on file with Chicago History Museum ICHI-62404).

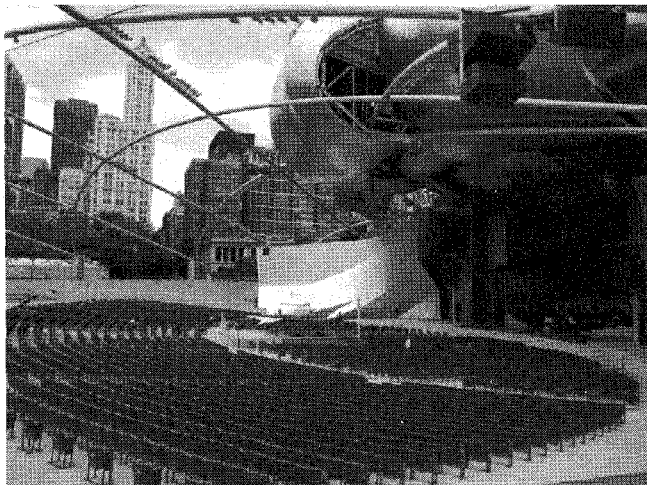
⁶⁰⁶ GILFOYLE, *supra* note 7, at 49.

⁶⁰⁷ Although the *Ward* cases were frequently alluded to as legal impediments to the new band shell, see, e.g., *Hope for Vote on Band Shell Nov. 3 Waning*, *supra* note 600, we have discovered only one instance in which a lawsuit was seriously threatened. See Ziemba, *Band-shell Opponents To Fight Plan in Court*, *supra* note 600. That dispute was later settled. Robert Davis & Stanley Ziemba, *Compromise Reached on New Band Shell*, *supra* note 602. The Park District and Chicago Plan Commission were nevertheless sufficiently concerned about the threat of litigation that at one point they decided “to make

Illinois Supreme Court had said that “certain structures are absolutely necessary for the comfort of the public and the proper use of the park, but most of them, such as shelters in the case of storms, *band stands*, lavatories, toilets, and the like, can be provided without the erection of what would properly be characterized as a building.”⁶⁰⁸ This was dictum, but it would likely be taken seriously by later courts, and would provide an obvious basis for constructing the argument that a band shell is not a “building” within the meaning of the public dedication.

The puzzle is why the Park District did not move ahead with a new band shell project, daring one or more landowners to initiate litigation, which they would likely lose.⁶⁰⁹ The answer is unclear, although increasing political conflict between the Park District and various civic and environmental advocacy groups over the general direction of park policy may provide part of the answer.⁶¹⁰ The political infighting made it difficult for the Park District to reach a consensus on a proposal, with the result that the showdown with Michigan Avenue property owners never occurred.

FIGURE 20: PRITZKER MUSIC PAVILION (2010) (PHOTO TAKEN LOOKING WEST)



a ‘deep’ examination” of the legal issues, including “[w]hether [a] proposal ‘[was] in accord with court decrees that Grant Park be forever vacant of buildings.’” Dolores McCahill, *New Band Shell for Park Delayed*, CHI. SUN-TIMES, Feb. 11, 1977, at 92.

⁶⁰⁸ Ward v. Field Museum of Natural History, 241 Ill. 496, 510, 89 N.E. 731, 736 (1909) (emphasis added).

⁶⁰⁹ The Park District suggested this route at one point. *Portable Band Shell Is Urged*, *supra* note 600. However, the path was never followed.

⁶¹⁰ The Park District faced obstacles from the Chicago Planning Commission, which had to approve all structures in the park, as well as opposition from civic groups such as Friends of the Parks. See Paul Gapp, *Grant Park Band Shell Back to Drawing Board*, CHI. TRIB., Mar. 14, 1977, § 4, at 1. See also Gapp, *supra* note 600.

C. *The Consent Mechanism*

The public dedication doctrine is a unanimous consent mechanism. Any abutting landowner can block a forbidden use, provided that he or she is willing to incur the expense of a lawsuit. But if all abutting owners consent to a use, the project can go forward, even if it would otherwise violate the dedication. The consent mechanism has been successfully invoked on four occasions with respect to Grant Park: the Public Library, the Art Institute, the temporary post office, and Millennium Park. Three of those invocations—all except the temporary post office—have had a profound effect on the visage of the park.

The Art Institute is by far the largest permanent building in the park, and it owes its presence to the consent mechanism. We have previously described the circumstances of its original construction in the park.⁶¹¹ The building was designed as a venue for the World's Congress Auxiliary, as part of the Columbian Exposition, and, after the fair, was turned over as a new permanent home for the Art Institute.⁶¹² The *Daggett* case, decided by a panel of circuit judges in 1892, held that all necessary Michigan Avenue owners except Sarah Daggett had consented to the erection of the building, and it ruled that Daggett's objections were barred by laches.⁶¹³ The idea that the Art Institute had obtained unanimous consent from Michigan Avenue owners received the imprimatur of the Illinois Supreme Court in *Ward I*, and from that time forward the consent mechanism has been understood to be the legal foundation for the Art Institute complex.

The original legislation authorizing construction of the Art Institute limited it to 400 feet of frontage on Michigan Avenue.⁶¹⁴ As constructed, the building occupied some 320 feet of frontage.⁶¹⁵ In ensuing years, the Art Institute would continually expand its facilities, though always to the east, and always in such a way as neither to increase its frontage along Michigan Avenue nor to raise its height above the original structure. In 1913, with the consent of the Illinois Central and the South Park Commissioners, the Art Institute constructed an addition called Gunsaulus Hall over the top of the Illinois Central right-of-way.⁶¹⁶ This permitted further expansion on the landfill area east of the railroad tracks, and

⁶¹¹ See *supra* Part IV.B.

⁶¹² See *supra* notes 76–81 and accompanying text.

⁶¹³ *Daggett v. City of Chicago*, 3 Ill. Cir. Ct. Rep. 79, 86–92 (Cook County, Ill., Cir. Ct. 1892). The decision also held, in the alternative, that the legislation authorizing condemnation of the rights of abutting owners had eliminated their right to injunctive relief, *id.* at 88–92, but this rationale was effectively overruled by *Ward III* and *Ward IV*, see *supra* Parts IV.D and IV.E.

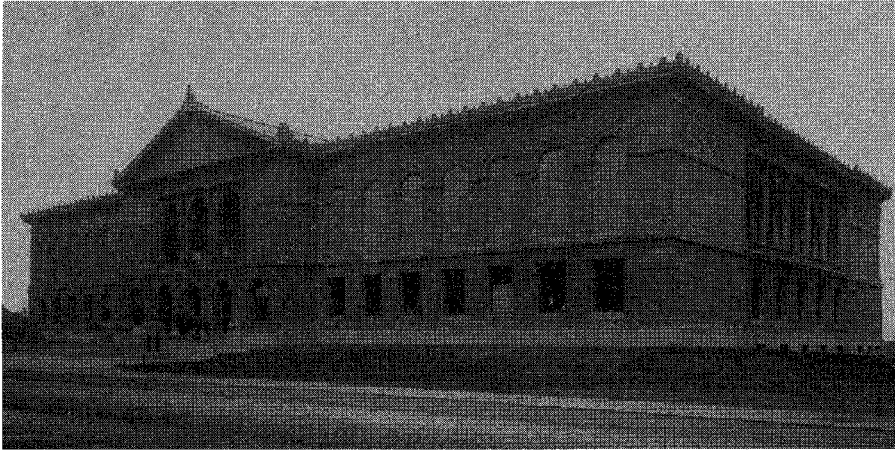
⁶¹⁴ *Stevens Hotel Co. v. Art Inst. of Chi.*, 260 Ill. App. 555, 568 (1931); JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO FOR COUNCIL YEAR 1891, at 1825–26 (1891).

⁶¹⁵ *Stevens Hotel*, 260 Ill. App. at 568.

⁶¹⁶ *Id.* at 568–69.

multiple additions were placed in this area between 1920 and 1926.⁶¹⁷ At no time during this relentless expansion did any Michigan Avenue landowner raise an objection.

FIGURE 21: ART INSTITUTE OF CHICAGO AS ORIGINALLY CONSTRUCTED (LOOKING NORTHEAST FROM MICHIGAN AVENUE)⁶¹⁸



In 1928, the Art Institute received permission from the SPC to embark on yet another addition east of the Illinois Central—the Agnes Allerton Wing—and this expansion finally elicited a legal challenge.⁶¹⁹ The Stevens Hotel, which also sought at the time to enjoin reconstruction of the Chicago Yacht Club, retained George Merrick to seek an injunction against the Art Institute. Merrick was more than successful in the circuit court, obtaining a broadly worded injunction from Judge Hugo A. Friend barring construction of any building, structure, enlargement, or extension “of any kind, size, nature or description whatever, or for any purpose whatsoever, anywhere within the limits of Grant Park.”⁶²⁰ An alarmed Art Institute, following the pattern of the *Ward* cases, filed a direct appeal to the Illinois Supreme Court. Finding that the conditions for a direct appeal were not satisfied, the supreme court transferred the case to the Illinois Appellate Court.⁶²¹

⁶¹⁷ *Id.* at 569.

⁶¹⁸ Photograph by J.W. Taylor (1897) (on file with Chicago History Museum ICHI-59520).

⁶¹⁹ See *Stevens Hotel*, 260 Ill. App. at 569–70.

⁶²⁰ *Stevens Hotel Co. v. Art Inst. of Chi.*, 342 Ill. 180, 181, 173 N.E. 761, 762 (1930) (quoting *Stevens Hotel Co. v. Art Inst. of Chi.*, No. B-176132, at 4 (Cook County, Ill., Cir. Ct. Mar. 15, 1930)) (internal quotation marks omitted).

⁶²¹ The question of the court’s jurisdiction had not been discussed by the parties but was raised by the court sua sponte. The court held that no question of any freehold was involved nor was there any challenge to the validity of any municipal ordinance or statute. *Id.* at 182–83, 173 N.E. at 762–63. The court apparently viewed the case as involving nothing more than the validity of the contract between the SPC and the Art Institute, authorizing the new extension.

The appellate court proceeded to render a remarkable decision which has effectively served as the legal charter for the Art Institute to the present day. The court was significantly handicapped in construing the scope of the original consents since they were not introduced into the record.⁶²² The

⁶²² *Stevens Hotel*, 260 Ill. App. at 566. In the *Boaz* litigation, see *infra* notes 635–40 and accompanying text, regarding the consents for Millennium Park, the City stated that the original Art Institute consents had been lost. See Motion to Dismiss Complaint at 3 & Response to Motion to Dismiss Complaint at 6–7, *Boaz v. City of Chicago*, No. 99L-3804 (Cook County, Ill., Cir. Ct. Jan. 14, 2000). We uncovered the original consent sheet in the court records for the *Daggett* case. The City in *Boaz* submitted a document from the archives of the Art Institute, which is a *typed* version of the original consent sheet submitted by Caryl Young in the *Daggett* litigation; the typed version adds to the original a title, an introductory paragraph, and has the signatures typed. Consent of Abutting Property Owners (Apr. 25, 1892) (on file with authors). The original consent sheet reads as follows:

Whereas the undersigned are respectively the owners and occupiers under lease of the property situate on the west side of Michigan Avenue and north of Jackson street, set opposite our names respectively, and,

Whereas, the World's Columbian Exposition and Art Institute of Chicago propose to erect a permanent building on the so-called Lake Front, north of the north line of Jackson street extended, and east of the east line of Michigan avenue, said building to be used for purposes connected with the World's Columbian Exposition until the close of said Exposition, at which time said Exposition is to release all claims of every kind and character it may have in and to the buildings erected upon said premises, and,

Whereas, thereafter said Art Institute proposes to control and devote said building to the permanent use of said Art Institute, and for the exhibition of works of art, including paintings, sculpture, etc., and also as a public memorial in memory of the discovery of America by Christopher Columbus,

Now therefore, for the purpose of promoting the construction of said public art building, and for the purpose of aiding the construction thereof—believing the same to be in the interest of the City of Chicago, we, the undersigned as owners and occupiers of said property so situated upon the west side and fronting Michigan avenue, hereby consent to the construction, erection and maintenance of said building for the purpose aforesaid, and also hereby waive and release all claims of any easement that we now have, or may heretofore have had in said Lake Front, north of Jackson Street; and hereby waive all claims of damages of every kind and character that may result from the erection and permanent maintenance of said building. PROVIDED, however, that if said building shall not be occupied by said Art Institute for the exhibition of arts as contemplated by the organization of said Institute, or if it shall be occupied for any other purpose or purposes than as above authorized, then this release shall be void and without effect.

signed

W.C. Ritchie	40 feet
per W.E. Ritchie atty	40 "
F.B. Rhodes	40 "
Caryl Young 145 Mich. Ave.	71 2/3 ft.
Spoor MacKey	51 "
Warren F. Leland	160 "
O. M. Powers	38 "
Leroy Payne	105 "
B.F. McNeill & Bros.	
Orrington Lunt	27 1/2 "
John S. Hair	26 "
Shepherd Brooks	
by Owen F. Aldis, Atty. in fact	90 cor. of Monroe
R. F. Newcomb No. 152 & 153	39 feet
[seal] Pullman Palace Car Co.	

court accordingly proceeded by indirection, looking to language in the statutes and ordinances authorizing the original construction of the building as well as to the language of the *Daggett* and *Ward I* decrees validating the consents. The court concluded from this review that the consents must have contemplated that the building would be permanent, that it would accommodate the reasonable needs of the Art Institute, and that it would include “necessary enlargement of the building” over time as the museum’s needs grew with an increasing Chicago population.⁶²³

The court reinforced these conclusions with a discussion of the conduct of the Michigan Avenue owners in the almost forty years that had elapsed since the building was initially authorized.⁶²⁴ After reciting the many additions and enlargements that had been made during this period, the court noted that all “were discussed in the public press and were generally known to all of the citizens of Chicago and particularly to the abutting property owners”; that the construction had taken place “in plain view” and was “easily visible” to the owners; that no owner at any time had commenced a legal proceeding against the Art Institute contesting these additions and enlargements; and that, notwithstanding all this, during the same time “abutting property owners ha[d] vigorously and successfully opposed the construction of any other buildings in Grant Park.”⁶²⁵ This analysis was advanced to support a construction of the consents based on the course of conduct by the owners. But it could equally have been used to establish a finding of acquiescence, waiver, or estoppel on their part; conceivably, it might even have established that the right of the owners had been extinguished by the open, notorious, and continuous adverse possession of portions of the park by the Art Institute.

The court concluded by observing that the Art Institute had offered at trial to enter into a number of stipulations if the broad injunction sought by the hotel was denied.⁶²⁶ The court observed that “these stipulations might well be incorporated in the final decree.”⁶²⁷ The result was in effect a regulatory injunction granting the Art Institute the right to construct an enormous complex, subject to height and frontage restrictions. As long as

by Geo. M. Pullman, Prest	120 ft. 5in.
Silas A. Barton	40 ft.
Winship & Price	40 feet

⁶²³ *Stevens Hotel*, 260 Ill. App. at 567, 576–77 (emphasis omitted). The language of “necessary enlargement” was found in the superior court decree in *Ward I*. See *id.* at 567.

⁶²⁴ *Id.* at 566–69.

⁶²⁵ *Id.* at 570.

⁶²⁶ These were as follows: the Art Institute would never exceed a boundary marked by Monroe Street on the north, Jackson Street on the south, Michigan Avenue on the west, and what is now called Columbus Drive on the east; it would never occupy more than 400 feet of frontage on Michigan Avenue; and it would never build a structure higher than the original building on Michigan Avenue. *Id.* at 577–78.

⁶²⁷ *Id.* at 578.

the Art Institute adhered to the terms of the injunction, it would have no further worries based on the public dedication doctrine.⁶²⁸ With its most recent additions, the Art Institute has filled virtually the entire area described by the stipulations.⁶²⁹

The *Art Institute* case resolved some important questions regarding the consent mechanism. A consent given by an owner is binding on successors in interest.⁶³⁰ A consent given to one structure does not constitute a waiver of rights to object to other structures in the future.⁶³¹ The scope of any consent is to be determined by general principles of contractual interpretation.⁶³² If the actual consents have been lost, then the scope must be determined inferentially by other evidence.⁶³³ Such other evidence includes the practical construction of the scope of the consents as reflected in the behavior of the parties.⁶³⁴

Many decades later, when attorneys advising the proponents of Millennium Park concluded that the Harris Theater would likely be regarded as a building, and hence that owner consents were necessary to eliminate the threat of litigation under the *Ward* precedents, further questions about the consent mechanism were presented. The question the attorneys focused on most intensively: who qualifies as an abutting owner for purpose of obtaining the needed consents? Based on the form from the archives of the Art Institute and the decision in *Ward I*, the attorneys concluded that consents were required only from those who owned property directly opposite or diagonally across from the project.⁶³⁵ Consents were solicited and obtained from owners or agents of owners within this group.⁶³⁶ A test case, *Boaz v. City of Chicago*, was then filed on behalf of the owners of a condominium on Randolph Street located farther east of Millennium Park, claiming that their consent was also required. The City moved to dismiss, and after briefing and argument, Circuit Court Judge Green granted

⁶²⁸ The final decree incorporated the stipulations. Decree at 3, *Stevens Hotel Co. v. Art Inst. of Chi.*, No. 31C176132 (Cook County, Ill., Cir. Ct. July 9, 1931).

⁶²⁹ See *supra* note 130 and accompanying text.

⁶³⁰ See *Stevens Hotel*, 260 Ill. App. at 575–76.

⁶³¹ See *id.* at 572.

⁶³² See *id.* at 576.

⁶³³ See *id.*

⁶³⁴ See *id.* at 572.

⁶³⁵ This was also the conception of the relevant universe of owners whose consent was required in constructing the Public Library and the temporary post office. For the Public Library, see *supra* note 86 and accompanying text. For the temporary post office, see *supra* notes 347–52 and accompanying text. It does not appear that the litigants in *Boaz* were aware of either precedent.

⁶³⁶ In the case of Millennium Park, this was every owner (and in some cases lessees) on the west side of Michigan Avenue from Monroe Street to Randolph Street, and every owner on the north side of Randolph Street from Michigan Avenue to Columbus Drive, plus the diagonally situated property owners on Michigan just south of Monroe, on Michigan just north of Randolph, and on Randolph just east of Columbus. There were fifteen owners in all in this area. Motion to Dismiss Complaint ¶¶ 4–5 & Exhibit E, *Boaz v. City of Chicago*, No. 99L-3804 (Cook County, Ill., Cir. Ct. Jan. 14, 2000).

the motion,⁶³⁷ effectively ruling that consent was required only from owners directly abutting and those diagonally located from the project.

This ruling was almost certainly wrong. None of the parties in *Boaz* cited the decisions in *Ward III* and *Ward IV*, which upheld Montgomery Ward's right to enjoin the construction of the Field Museum.⁶³⁸ The museum was to be located in the park at Congress Street, a full five blocks south of Ward's property at Madison Street. Thus, the Illinois Supreme Court understood that Ward had standing to object even though his property was neither opposite nor diagonal from the proposed project. If Ward had standing to object, then his consent would be required under the consent mechanism. Similarly, when the Stevens Hotel sought to block construction of the Chicago Yacht Club and an addition to the Art Institute, the courts did not suggest that it lacked standing because the hotel was not located directly opposite or diagonally from these structures. Again, if the Stevens Hotel had standing to object, then its consent was required under the consent mechanism.⁶³⁹

Given that the *Boaz* consent theory is inconsistent with Illinois Supreme Court precedent, Millennium Park is vulnerable to a legal challenge by nonconsenting owners abutting other parts of the park, such as owners located farther south of Monroe Street.⁶⁴⁰ Now that Millennium Park has been built, any such action would likely be met by a defense of laches. Still, more thorough legal research would have been a good idea before piling \$370 million in improvements in the northwest corner of Grant Park.

VI. ASSESSING THE PUBLIC DEDICATION DOCTRINE

It remains to consider some more-general lessons that can be drawn from the story of Chicago's premier public park. What accounts for the decline of the public dedication doctrine, to the point where it is today largely forgotten? How does the public dedication doctrine stack up against the public trust doctrine? What does the public dedication doctrine tell us about the merits of creating antiproperty rights to protect public spaces?

⁶³⁷ *Boaz*, No. 99L-3804.

⁶³⁸ *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N.E. 731 (1909); *S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1910).

⁶³⁹ It was stipulated in the *Art Institute* litigation that the "predecessors in title" of the hotel had given their consent to the Art Institute. *Stevens Hotel*, 260 Ill. App. at 564. This stipulation is inconsistent with the consents actually obtained by Caryl Young for the Art Institute. See *supra* note 622. The Stevens Hotel was 2563 feet (or almost five blocks) south of the Art Institute.

⁶⁴⁰ The consent procedure followed in obtaining approval for the Art Institute and Millennium Park is also inconsistent with the Chicago City Charter of 1861 and of 1863, which provided that no encroachments were to be permitted in the park "without the assent of *all* the persons owning lots or land on said street or avenue" (emphasis added). See *supra* notes 49–50 and accompanying text.

A. *The Decline of the Public Dedication Doctrine*

Shortly before the first *Ward* case was decided, the U.S. Supreme Court, in *Illinois Central*, launched the modern public trust doctrine.⁶⁴¹ The Court rejected the Illinois Central's claim that it had acquired vested rights under the Lake Front Act of 1869, which the State had taken by repealing the Act in 1873. The submerged land under Lake Michigan was owned by the State of Illinois in trust for the people.⁶⁴² The conveyance by the legislature of this land to the railroad was a breach of this trust.⁶⁴³ The railroad's claim of vested rights was thus without merit, because the State had no authority to convey such extensive rights in the submerged land to the railroad in the first place.

Given that the *Ward* cases and the public trust doctrine both emerged in the same place at approximately the same time, the history of the Chicago lakefront provides an instructive source of information about the relative merits of these two public rights doctrines. Although the public dedication doctrine and the public trust doctrine have not always been sharply distinguished, they in fact rest on very different understandings. The public dedication doctrine is a creation of the law of equity. It allows persons who have purchased real property in reliance on a dedication of nearby land to public use to sue to enjoin departures from the dedication. The public trust doctrine is a doctrine about the legal title in which certain public assets are held. It provides that these assets are held in trust for the people, and hence cannot be transferred to nongovernmental entities for purposes that would violate the trust.⁶⁴⁴

A well-informed observer, considering the way the two doctrines had been applied on the Chicago lakefront up to, say, 1912, would likely conclude that the public dedication doctrine was quite powerful, whereas the public trust doctrine was relatively weak. As we have seen, the public dedication doctrine had been used to defeat multiple proposals, enjoying widespread political support, to build armories, libraries, and museums in the landfill area of Grant Park.⁶⁴⁵ The public dedication had even been held to be immune from condemnation under the power of eminent domain.⁶⁴⁶

The public trust doctrine, in contrast, presented little obstacle to ambitious projects calling for further landfilling of the lake. To be sure, the Illinois Central's claim of right to construct and control an outer harbor had

⁶⁴¹ Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

⁶⁴² *Id.* at 452-56.

⁶⁴³ *Id.* at 455.

⁶⁴⁴ See *Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 325-27, 786 N.E.2d 161, 169-70 (2003).

⁶⁴⁵ See *supra* Part IV.

⁶⁴⁶ *S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 304-06, 93 N.E. 910, 912-13 (1910).

been thwarted in the name of the public trust.⁶⁴⁷ But in further proceedings conducted on remand from *Illinois Central*, the local federal courts held that the railroad's improvements built on landfill in Lake Michigan up to the time of the Court's decision were all consistent with the public trust doctrine since they did not interfere with the public's access to the lake for purposes of navigation or fishing.⁶⁴⁸ The Supreme Court subsequently affirmed these holdings.⁶⁴⁹ In another decision of far-reaching consequence, the Illinois Supreme Court held in 1896 that Chicago authorities could construct Lake Shore Drive north of the river on landfill in the lake and finance the project by selling the submerged land between the new roadway and the shore to private owners.⁶⁵⁰ The project had the blessing of the state legislature, and the court said that it would defer to the legislature's judgment as to whether this was consistent with the public trust in which the land was held.⁶⁵¹ As the twentieth century advanced, the public trust doctrine remained relatively impotent. The Illinois courts had little trouble approving projects to build a large water filtration plant on landfill in the lake and a massive convention center on landfill just south of Grant Park and the Field Museum, and further held that because of laches the public had lost any claim to the air rights above the landfill on which the Illinois Central had located its terminal facilities north of Randolph Street.⁶⁵²

The tipping point in the relative prominence of the two doctrines, at least in Illinois, can be marked with precision. In *Paepcke v. Public Building Commission of Chicago*,⁶⁵³ the Illinois Supreme Court was faced with a challenge to a plan to use two city parks as sites for the construction of new school buildings. The plaintiffs challenged the plan under both the public dedication and the public trust doctrines. The court summarily rejected the public dedication argument. A doctrine enforced by the Illinois Supreme Court to protect public spaces in dozens of cases over a century was effectively interred with the comment that "[t]he mere dedication by the sovereign of lands to public park uses does not give property owners adjoining or in the vicinity of the park the right to have the use continue unchanged."⁶⁵⁴ The *Ward* cases were distinguished on the ground that the Chicago city charters of 1861 and 1863 gave abutting property owners of Grant Park a statutory cause of action, whereas the plaintiffs in *Paepcke* had

⁶⁴⁷ *Ill. Cent. R.R. v. Illinois*, 146 U.S. at 454–55.

⁶⁴⁸ *Illinois ex rel. Hunt v. Ill. Cent. R.R.*, 91 F. 955, 957–62 (7th Cir. 1899).

⁶⁴⁹ *Illinois v. Ill. Cent. R.R.*, 184 U.S. 77, 99 (1902).

⁶⁵⁰ *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 148–53, 45 N.E. 830, 834–35 (1896).

⁶⁵¹ *Id.*

⁶⁵² See *Bowes v. City of Chicago*, 3 Ill. 2d 175, 120 N.E.2d 15 (1954) (water-filtration plant); *Fairbank v. Stratton*, 14 Ill. 2d 307, 152 N.E.2d 569 (1958) (McCormick Place convention center); *Hickey v. Ill. Cent. R.R.*, 35 Ill. 2d 427, 220 N.E.2d 415 (1966) (air rights over the Illinois Central's terminal facilities north of Randolph Street).

⁶⁵³ 46 Ill. 2d 330, 263 N.E.2d 11 (1970).

⁶⁵⁴ *Id.* at 338, 263 N.E.2d at 16.

no such special statutory right.⁶⁵⁵ This ignored the fact that the Illinois Supreme Court, in the *Ward* cases, had rested on the general public dedication doctrine, not on any statutory right peculiar to the lakefront.⁶⁵⁶

The public trust theory, in contrast, was treated by the *Paepcke* court much more sympathetically. The court quoted at length from a recent law review article by Professor Joseph Sax urging courts to look to the public trust doctrine to protect the public interest in common resources, and seemingly endorsed this conclusion.⁶⁵⁷ Overruling prior decisions, it held that any taxpayer was entitled to sue to enforce the public trust.⁶⁵⁸ In terms of the substantive content of the trust, the court adopted Wisconsin precedents setting forth a five-part test for determining whether a diversion in the use of public trust lands is permissible.⁶⁵⁹ The bottom line, however, was disappointing for the plaintiffs: the court simply announced, without any analysis, that the public trust was not violated by the decision to build schools in public parks.⁶⁶⁰

After *Paepcke*, the public dedication doctrine disappeared in Illinois as a tool for preserving public spaces such as parks and was replaced by the public trust doctrine.⁶⁶¹ The results have been mixed. Plans to landfill Lake Michigan in order to expand U.S. Steel's South Works plant were scuttled, as was a plan to expand Loyola University's Lakeshore Campus in Rogers Park on the far north side of the City.⁶⁶² But the Illinois Supreme Court had no difficulty approving a complete reconstruction of the venerable Soldier Field to meet the specifications of the Chicago Bears football team.⁶⁶³

Although the proximate cause of the demise of the public dedication doctrine as a protector of public uses, at least in Illinois, was the Illinois Supreme Court's decision in *Paepcke*, no doubt there were deeper causes as well. With the merger of law and equity and the general decline in the

⁶⁵⁵ *Id.* at 339–40, 263 N.E.2d at 17–18.

⁶⁵⁶ *See, e.g.,* City of Chicago v. Ward, 169 Ill. 392, 409, 48 N.E. 927, 932 (1897).

⁶⁵⁷ *Paepcke*, 46 Ill. 2d at 336–38, 263 N.E.2d at 16 (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 482–86 (1970)). On the influence of the Sax article in spurring a revival of the public trust doctrine, see Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

⁶⁵⁸ *See Paepcke*, 46 Ill. 2d at 341, 263 N.E.2d at 18.

⁶⁵⁹ *Id.* at 343–44, 263 N.E.2d at 19.

⁶⁶⁰ *Id.* at 344, 263 N.E.2d at 19.

⁶⁶¹ Illinois courts continue to recognize the public dedication doctrine in the context of dedicated roads and alleys. *See, e.g.,* Vill. of Joppa v. Chi. & E. Ill. R.R., 51 Ill. App. 3d 674, 366 N.E.2d 388 (1977); *see also* Harris Bank of St. Charles v. City of Geneva, 278 Ill. App. 3d 738, 663 N.E.2d 483 (1996); Terwelp v. Sass, 111 Ill. App. 3d 133, 443 N.E.2d 804 (1982). In effect, public dedication law has reverted to the narrow scope that it enjoyed under English law. *See supra* note 144 and accompanying text.

⁶⁶² *People ex rel. Scott v. Chi. Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976) (U.S. Steel South Works); *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441 (N.D. Ill. 1990) (Loyola Lakeshore Campus).

⁶⁶³ *See Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 786 N.E.2d 161 (2003).

study of equity as a separate field of legal inquiry,⁶⁶⁴ the doctrinal underpinnings of the public dedication doctrine in the law of equity have no doubt seemed increasingly foreign to lawyers and judges.

The general understanding of public property has also changed. In the nineteenth century, public property tended to be regarded as something akin to “inherently public” property or open-access resources.⁶⁶⁵ The idea that particular individuals might obtain special rights in open-access resources did not seem strange, whether it was someone pulling a fish from a public stream or discovering minerals on the public domain.⁶⁶⁶ With the growth of government and the number of government employees who serve as custodians of public resources, public property has come to be regarded as largely equivalent to private property, except that government agents manage and control it. The idea that private owners might have special rights in government property in this stronger sense seems harder to sustain.

Private property and public rights have come to be regarded as mutually exclusive in more fundamental ways as well. Preservationists and environmentalists tend to see private property as a threat to public values.⁶⁶⁷ Private property, in the typical view, encourages self-regarding and exploitative behavior. Effective protection of common and public resources necessitates the extension of governmental control over resources. This attitude is gradually becoming more nuanced, as the environmental community increasingly sees value in market mechanisms based on novel types of property or property-like rights.⁶⁶⁸ But the public dedication doctrine entered its desuetude at a time when private property was viewed as the enemy of public rights.

Finally, a generalized norm of citizen equality is relevant here. We tend to think of public property as something open to all members of the public on equal terms. The public dedication doctrine does not directly contradict this understanding. But, as evidenced in the *Ward* cases, it seems to say that some members of the public have a greater say about the way in which public property will be used and managed than do other members of the public. Just as the Supreme Court has tended to take a dim view of

⁶⁶⁴ See Lester B. Orfield, *The Place of Equity in the Law School Curriculum*, 2 J. LEGAL EDUC. 26 (1949) (discussing the debate then underway about whether to retain equity as a separate course of study in law school). Orfield notes that only eight schools had abandoned the course in equity in 1949, but three were in Illinois: Northwestern, the University of Chicago, and Illinois. *Id.* at 36–37. Since then, principles of equity have generally been taught in courses in “remedies,” when they are taught at all.

⁶⁶⁵ See Rose, *supra* note 11, at 762–66.

⁶⁶⁶ For example, prospectors operating in the public domain could acquire rights to exclude other members of the public under the *pedis possessio* doctrine. See *Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 353 (1919).

⁶⁶⁷ See Thomas W. Merrill, *Private Property and the Politics of Environmental Protection*, 28 HARV. J.L. & PUB. POL’Y 69, 69 (2004).

⁶⁶⁸ See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988).

voting schemes that give the franchise to property owners and not to others,⁶⁶⁹ so a legal doctrine that gives authority over public resources to certain property owners and not others seems to run counter to the democratic ethos.⁶⁷⁰

B. Public Dedication Versus Public Trust

Notwithstanding its general demise as a source of protection for public uses, it is worth considering how the public dedication doctrine, at least as elaborated in the *Ward* precedents, stacks up against the more-favored public trust doctrine as a tool for protecting public spaces. Five potential advantages of the public dedication doctrine can be cited.

First, the public dedication doctrine covers a much wider array of resources. With the exception of *Paepcke*,⁶⁷¹ which involved urban parkland, all Illinois public trust cases have involved land that is or was covered by navigable waterways.⁶⁷² Illinois is not exceptional in this regard. In virtually all states, the public trust doctrine remains tethered to navigable waters, and courts have resisted extending the doctrine to public lands having no nexus to navigable waters.⁶⁷³ The public dedication doctrine, in contrast, applies to any and all lands that have been dedicated to public uses, including streets, alleys, squares, landings, and parks.⁶⁷⁴ The only requirement for enforcement in equity is that there be one or more

⁶⁶⁹ See *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating municipal voting scheme granting only property tax payers the right to vote on elections to approve municipal utility bonds); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down voter-qualification statute for school district elections limiting the vote to owners or lessees of taxable real property); cf. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (upholding voting scheme for the directors of public water district limited to landowners).

⁶⁷⁰ For an argument supporting a modest return to voting by property owners, see Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275 (2010).

⁶⁷¹ *Paepcke v. Pub. Bldg. Comm'n*, 46 Ill. 2d 330, 263 N.E.2d 11 (1970).

⁶⁷² See *Ill. Central R.R. v. Illinois*, 146 U.S. 387 (1892); *United States v. Ill. Cent. R.R.*, 154 U.S. 225 (1894); *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 45 N.E. 830 (1896); *Illinois ex rel. Hunt v. Ill. Cent. R.R.*, 91 F. 955 (7th Cir. 1899); *Ill. Cent. R.R. v. City of Chicago*, 176 U.S. 646 (1900); *Illinois ex rel. Hunt v. Ill. Cent. R.R.*, 184 U.S. 77 (1902); *Bowes v. City of Chicago*, 3 Ill. 2d 175, 120 N.E.2d 15 (1954); *Fairbank v. Stratton*, 14 Ill. 2d 307, 152 N.E.2d 569 (1958); *Hickey v. Ill. Cent. R.R.*, 35 Ill. 2d 427, 220 N.E.2d 415 (1966); *People ex rel. Scott v. Chi. Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976); *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441 (N.D. Ill. 1990).

⁶⁷³ See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) [hereinafter Craig, *Eastern States*] (surveying the public trust doctrines of thirty-one states and finding nearly universal connection to navigable waterways); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter Craig, *Western States*] (surveying the public trust doctrines of the remaining nineteen states and finding same).

⁶⁷⁴ MCQUILLIN, *supra* note 143, § 33:9.

private landholdings adjacent to the public space whose value is affected by the public dedication.⁶⁷⁵

Second, the public dedication doctrine provides a much more objective test for identifying the protected resources and the nature of the constraints imposed on public authorities. This is especially true where the doctrine is anchored in some kind of published plat or map, as was the case with the Chicago lakefront. The area covered by the doctrine (e.g., Randolph Street to Park Row) and the restrictions imposed by the doctrine (e.g., no buildings) were set forth on maps in discernible markings and words, although of course, as we have seen, disputes have arisen about the exact meaning of these markings and words.⁶⁷⁶ Even absent an express marking on a map or plat, longstanding public use serves as a relatively objective indicator of what spaces are subject to the doctrine and in what respects they have been dedicated. The public trust doctrine, in contrast, is mired in uncertainty about what kind of nexus to navigable waters is required (if any), and what kinds of trust obligations are imposed on the state when the doctrine applies.⁶⁷⁷

Third, the public dedication doctrine incorporates a rule-like understanding, which encourages judicial enforcement and facilitates bargaining among affected interests. In the case of a specific dedication, such as the “no buildings” restriction on the Chicago lakefront, the public dedication doctrine grants abutting owners the power to insist on strict compliance with the dedication. “No buildings” means no buildings. Even in the case of a general dedication, such as an open space on a map, the doctrine often enshrines the status quo as reflected in longstanding public uses.⁶⁷⁸ The public trust doctrine, on the other hand, tends to reflect a

⁶⁷⁵ See *supra* notes 164–67, 175–76 and accompanying text.

⁶⁷⁶ There is also the further complication that the map of section 15 stating that the public space was not to be filled with buildings was a commercial map that was not recorded. See *supra* notes 27–30 and accompanying text. The court in *Ward I* nevertheless concluded that section 15 was also subject to the same public dedication as section 10 by virtue of public representations by the Canal Commissioners concerning section 15, and that section 10 and section 15 should be regarded as part of a single public dedication. *City of Chicago v. Ward*, 169 Ill. 392, 402–03, 48 N.E. 927, 930 (1897).

⁶⁷⁷ See Craig, *Eastern States*, *supra* note 673, at 14–15; Craig, *Western States*, *supra* note 673, at 71–75.

⁶⁷⁸ Courts have generally recognized two types of distinctions in discussing public dedications. One is the distinction between statutory dedications, where a public entity has followed a statutory procedure in accepting a dedication, and common law dedications, where the offer and acceptance of a dedication are based on the totality of the circumstances. See MCQUILLIN, *supra* note 143, § 33:3; see also *supra* note 139. The U.S. Supreme Court, in the second *Illinois Central* case, found that the Fort Dearborn Addition (fractional section 10) was a statutory dedication because it conformed to the state statute governing dedications. *United States v. Ill. Cent. R.R.*, 154 U.S. 225, 236–38 (1894). The Illinois Supreme Court, in the *Ward* cases, indicated that it did not matter whether the dedication on the Chicago lakefront was statutory or common law. See *Ward*, 169 Ill. at 403, 48 N.E. at 930. The other distinction is between specific dedications, where particular uses are required or proscribed, and general dedications, which simply convey land to the general use of the public. See *United States v. Ill. Cent. R.R.*, 26 F. Cas. 461 (C.C.N.D. Ill. 1869); MCQUILLIN, *supra* note 143, § 33:11. The Illinois courts

poorly defined standard, which confers considerable discretion on courts and tends to make bargaining among interest groups more difficult. In Illinois, the courts have searched for an enforceable rule and have found only one: title to public trust lands must not be transferred to private entities.⁶⁷⁹ This has done little to further the cause of preservation.

Fourth, the public dedication doctrine incorporates a standing rule that identifies, in addition to public authorities, a finite group of virtual representatives of the public who can enforce or waive the dedication: abutting landowners. Abutting landowners will be motivated to monitor for violations and to seek to prevent deviations from permitted uses, for they have a direct financial interest in doing so. Part of the value of the public dedication is capitalized in the value of their real estate holdings, and this gives the members a powerful incentive to seek to preserve the dedication.⁶⁸⁰ Thus, if momentary enthusiasms for development of public spaces overcome civic leaders, abutting landowners can step forward to resist the idea, and in so doing protect longer-run interests in conserving public spaces.

In contrast, the public trust doctrine swings between one of two extremes in terms of standing rules. In Illinois, before *Paepcke*, only the Attorney General could sue to enforce the public trust; afterwards, any state taxpayer had standing to sue.⁶⁸¹ The former rule leaves enforcement of the public trust subject to the vagaries of the political process; the latter rule supplements public enforcement with enforcement activity by nonprofit advocacy groups. Limiting enforcement to public officials may lead to underenforcement, particularly if public officials are vulnerable to capture by private interests that favor development. Expanding enforcement by recognizing universal taxpayer standing may result in overenforcement, insofar as the preferences of advocacy groups may not align with median voter preferences. Moreover, allowing any advocacy group to bring an enforcement action may mean in practice that the decision whether to enforce particular restrictions on the use of public spaces is delegated to the discretion of the courts, which raises difficult questions about whether this is a legitimate judicial function.⁶⁸²

eventually agreed that the Chicago lakefront dedication was a specific dedication proscribing buildings within the dedicated space. See *Ward v. Field Museum of Natural History*, 241 Ill. 496, 508–10, 89 N.E. 731, 736 (1909).

⁶⁷⁹ *Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 325–28, 786 N.E.2d 161, 169–70 (2003); *People ex. rel. Scott v. Chi. Park Dist.*, 66 Ill. 2d 65, 77–78, 360 N.E.2d 773, 779–80 (1976).

⁶⁸⁰ For a general explanation of how neighborhood amenities are capitalized in land values, see WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

⁶⁸¹ See *Paepcke v. Pub. Bldg. Comm'n*, 46 Ill. 2d 330, 341, 263 N.E.2d 11, 18 (1970).

⁶⁸² See William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997) (suggesting that the public trust doctrine suffers from a democracy

Fifth, provided that the number of abutting owners is not too large, the public dedication doctrine provides a mechanism for allowing modifications to the dedication over time. Minor deviations that have a minimal impact on abutting land values will not likely be challenged, and once such projects have been completed, challenges will be barred by laches. Major deviations that nevertheless enhance the value of abutting property may also take place pursuant to the unanimous consent mechanism. The public trust doctrine is also subject to the defense of laches,⁶⁸³ but contains nothing like the unanimous consent mechanism for achieving ex ante authorization to modify public uses.

No legal doctrine functions perfectly, of course, and our review of the history of the public dedication doctrine in the context of the Chicago lakefront also reveals some limitations of that doctrine. One clear limitation is that the private interests of abutting landowners will often fail to generate a level of enforcement activity commensurate with the total value to the community of preserving public spaces. Almost by definition, the value to abutting landowners will be a fraction of the total community value. Thus, although it is quite possible that the public dedication doctrine will generate *more* enforcement activity than the public trust doctrine, it is unlikely that it will generate optimal levels of enforcement.

In the context of Chicago's lakefront park, Montgomery Ward was by no means the only enforcement agent. A variety of owners, ranging from John Stafford to Warren Leland, Sarah Daggett, Clarence Marks, Levy Mayer, Robert H. McCormick, and the Stevens family all took up the cause of protecting the park.⁶⁸⁴ The public dedication doctrine generated a fairly consistent level of enforcement activity by abutting landowners from 1864 until the new millennium, with the exception of the period immediately after the 1871 fire that destroyed most of the structures along Michigan Avenue.⁶⁸⁵

Nevertheless, Montgomery Ward unquestionably engaged in enforcement activity at a higher and more sustained level than any owner before or since. Other owners sought and obtained temporary injunctions. But they usually dropped out of the picture after a few years. Rarely did they persist in litigating to the point of securing a permanent injunction. And only Ward was willing to fund litigation through repeated rounds of appellate litigation.

This suggests that perhaps one or more abutting owners must have unusually large stakes to obtain effective enforcement. If every abutting

deficit); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) (arguing that public regulation is inherently superior to judicial enforcement of a vague trust obligation).

⁶⁸³ Hickey v. Ill. Cent. R.R., 35 Ill. 2d 427, 220 N.E.2d 415 (1966).

⁶⁸⁴ See *supra* Parts III and IV.B.

⁶⁸⁵ See *supra* notes 57–74 and accompanying text.

owner has an equal and relatively small stake, then it will be difficult to form a coalition to share the costs of litigation, because of familiar problems in forging agreements for collective action.⁶⁸⁶ Only if one or more owners have unusually large stakes—either because they have more land or because their land is more sensitive to the preservation of public uses—will the public dedication mechanism work.⁶⁸⁷ The Ward history also suggests that effective enforcement may depend on one or more owners being rather fanatical, either because they harbor unusually intense preferences for preservation or because they are drawn into a grudge match with proponents of development, or for some other reason. Obviously, the conditions that call forth a champion who fights to defend a public dedication will be somewhat rare.

Another limitation highlighted by the history is that the preferences of abutting owners and of the general public may diverge, sometimes quite significantly. On the largest question—whether to maintain a public space or permit it to be privatized—there is likely to be a convergence of interests. But on subsidiary issues, abutting landowners may harbor very different preferences about how to manage public spaces. To simplify, abutting owners are likely to prefer peace and quiet, whereas the general public may want fun and games. As we have seen, Michigan Avenue owners tended to oppose baseball stadiums, toboggan slides, armories used as venues for prize fights, circuses, political conventions held in wigwams, and pavilions for outdoor concerts. It is likely that a public referendum would yield different views on these activities. Ward, who became the park's most important enforcement agent, may have harbored even more negative views about public gatherings than most abutting owners.

C. *The Feasibility of Antiproperty*

Finally, our history allows us to offer some observations about the proposal to confer antiproperty rights on abutting owners of public spaces in order to encourage their preservation.⁶⁸⁸ This proposal closely conforms to the public dedication doctrine, but with some significant qualifications.

One qualification concerns who has the burden of going forward in a regime of unanimous consent. If public authorities must solicit consents, then the costs of exercising a veto are very low. An owner merely has to refuse to sign a form. If abutting owners must go to court and secure an

⁶⁸⁶ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

⁶⁸⁷ The argument is analogous to the claim that asymmetric stakes are necessary for the emergence of property rights, see Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S331–33 (2002), or that skewed distribution is necessary for effective enforcement of public-safety rules, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 134–38 (1994).

⁶⁸⁸ See Bell & Parchomovsky, *supra* note 16.

injunction, then the costs of exercising a veto are much higher. Now owners must incur substantial litigation costs in order to wield a veto.

The assumed burden of going forward implicitly shifted from time to time during the history of the Chicago lakefront. During the heyday of Ward's reign as watchdog, city officials came to behave as if they had to obtain Ward's consent before they could do anything on the lakefront. This also appears to have been the assumption during the thirty-year period in which the Park District was frustrated in its efforts to build a new band shell. But after the Chicago Fire, and perhaps more recently during the planning for Millennium Park, city officials seem to have assumed that they have the right to build, unless and until an owner obtains a court order stopping them. Perhaps the assumption about who has the burden of going forward depends on how clearly the dedication applies, and on how salient the possibility of judicial enforcement is in the minds of those affected.

In any event, if one were to legislate an antiproperty rule, a critical variable would be to determine the burden of going forward under a unanimous consent rule. One could legislate a rule requiring owner consent in all cases, which would make the costs of exercising the veto low. Alternatively, one could legislate a right to object that would be effectuated only by securing a judicial judgment, which would make the costs of exercising the veto relatively high.

The history of Grant Park suggests that a costly veto is better. Any activity as complex as managing a public park or similar public space will entail many issues as to which reasonable minds can differ. Should public lavatories be permitted in the park or not? Should temporary tents for festivals be permitted or not? If public authorities must secure unanimous consent for every decision, nothing will be permitted, and the park may degenerate into an unruly or unused commons. One solution would be to try to define the types of major decisions that require authorities to secure unanimous consent, leaving minor issues to the discretion of public authorities. But this would generate disputes about what is major and minor. The public dedication doctrine partially solves the problem by in effect imposing a tax on the exercise of the veto, equal to the legal fees that must be expended to secure an injunction. Under the American rule that precludes fee-shifting, this means that abutting owners will exercise the veto only if the disutility of the proposed change is sufficiently severe to warrant the investment in legal fees.

A second qualification concerns the number of parties who must consent. The larger the number of parties, the higher the transaction costs of securing unanimous consent. Bell and Parchomovsky write as if the higher the transaction costs the better, because the public space will be more effectively protected.⁶⁸⁹ This perspective, however, leads to the

⁶⁸⁹ See *id.* at 5–6.

conclusion that consent should be required of everyone in the community, since this would generate the highest level of transaction costs and hence the most protection.

The history of Grant Park suggests that overprotection is a problem as well as underprotection. Grant Park would be a less valuable public resource without the Art Institute, and the Art Institute was made possible only because it was feasible to obtain the consent of directly abutting owners. Likewise, Grant Park would be less valuable without Millennium Park, which was also made possible by the consent mechanism. This in turn suggests that the number of abutting owners who wield the veto should not be so numerous that unanimous consent can never be obtained for major modifications of the public space.

If this conclusion is sound, then the understanding of the relevant universe of parties who must consent that was followed in securing approval of the Art Institute, the Public Library, and Millennium Park—directly abutting plus diagonally situated owners—is a better rule than the one implied by the decisions in *Ward III* and *IV*—all abutting owners surrounding the park. Today, with commercial real estate located on three sides of the park, and many of the structures organized as condominiums, securing unanimous consent of all abutting owners would be virtually impossible. Adopting the large universe of affected parties implied by *Ward III* and *IV* would be tantamount to eliminating any realistic prospect of securing a waiver of the dedication. History suggests that this is too inflexible. The precedent embedded in practice may, at least in this context, be superior to the one embodied in judicial decisions.

CONCLUSION

The public dedication doctrine has largely disappeared, at least as a tool for protecting public spaces such as parks, squares, and commons. The history of Grant Park suggests that this is regrettable. The park would not exist today were it not for the understanding that public dedications create rights in abutting owners, allowing them to insist on strict adherence to public uses. The public dedication doctrine was called upon by generations of property owners on Michigan Avenue, most prominently but not exclusively Montgomery Ward, to fight off a seemingly endless series of proposals for erecting structures in the park. The result of their efforts was to create a spectacular public space in the center of Chicago, one of the most dramatic urban spaces in the world today (see Figure 22). Various fortuities entered into the story of how this happened, including large events such as the Chicago Fire and the Columbian Exposition, and quirks of personality such as the mysterious Mr. Ward. But the law was also a major contributing force. If that law is forgotten, the odds of creating similar public spaces in the future will be diminished.

FIGURE 22: AERIAL PHOTOGRAPH OF GRANT PARK FROM LAKE MICHIGAN BY MARGE BEAVER (2005)

